80-6604

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SUPREME COURT, U.S.

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN
THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,

Russell F. Canan /sk

Russell F. Canan

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STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD WAYNE THOMAS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes_____ No ✓

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. APR. 1979: $372.00 PER MO.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes_____ No ✓

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes_____ No ✓

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes_____ No ✓

a. If the answer is yes, describe the property and state its approxamate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Donald W. Thomas

DONALD WAYNE THOMAS

STATE OF GEORGIA
COUNTY OF _____

SUBSCRIBED AND SWORN TO
before me this the 20 day of March, 1981.

Mary L. Dyson

My Commission expires:
My Commission Expires August 6, 1984

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-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether, in affirming the imposition of the sentence of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the words "torture" and "depravity of mind" in finding aggravating circumstances as to violate the Eighth and Fourteenth Amendments to the Constitution?

II. Where the sentence of death was originally imposed by a jury whose discretion was not properly channeled and directed, did the failure of the Supreme Court of Georgia to remand the case for a new sentencing hearing violate petitioner's right under the Eighth and Fourteenth Amendments?

III. Whether the Supreme Court of Georgia's failure to provide for briefs or argument upon remand from this Court violated petitioner's Sixth, Eighth and Fourteenth Amendment rights?

IV. Whether petitioner was denied due process of law by the trial court's failure to conduct an evidentiary hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizarre and irrational behavior?

V. Whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois when several venirepersons were prematurely excluded for cause upon expressing doubt about whether they could impose a penalty of death without determining whether they could consider the death penalty in this case?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPINION BELOW

The original decision of the Supreme Court of Georgia is reported as Thomas v. State, 245 Ga. 688, 266 S.E.2d 499 (1980). The opinion is appended to this petition at 1a. That judgment was vacated and this case remanded for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980), by this Court on November 17, 1980. Thomas v. Georgia, ___ U.S. ___, 66 L.Ed.2d 285, 101 S.Ct. 523 (1980). Thereafter, the Georgia Supreme Court issued an "Addendum" to its opinion which is reported as Thomas v. State, ___ Ga. ___, 275 S.E.2d 318 (1981). The addendum is appended to this petition at 7a.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on March 3, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting

here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendement to the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

The Eighth Amendment provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1(b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.
>
> (b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is

presently mentally incompetent to stand trial and if so, whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).

(c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the foreseeable future, the department shall report that finding and the reasons therefore to the committing court and the person provided that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . . .

. . .

(e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .

(f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review a decision of that court affirming his conviction of murder and his sentence of death in the Fulton County Superior Court.

The petitioner, a 19-year-old black male with a ninth grade education, was convicted of murder on October 24, 1979 following a jury trial. That same day, the jury recommended that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. R. 119. 1/

From the outset, there was a question as to the competency

1/ "R." refers to the Record on Appeal to the Supreme Court of Georgia.

of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." R. 5.

The petitioner was first examined pursuant to the Court's order on June 1, 1979, by Dr. Lloyd T. Baccus, M.D., the director of the inpatient psychiatry division of the Psychiatry and Law Service of Grady Memorial Hospital in Atlanta. Dr. Baccus reported to the Court that the petitioner "had no idea of the month or day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." 2/ During the examination, Dr. Baccus reported, the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." Because of the petitioner's mental condition, the clinical interview could not be completed and the doctor was unable to elicit any substantial family or personal history. Dr. Baccus was also unable to offer an opinion as to the petitioner's mental status at the time of the offense because petitioner's "state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense." App. at 9a.

These observations were found by Dr. Baccus to be "clearly indicative of a diagnosis of schizophrenia." He also reported that the petitioner "did not appear to appreciate his role in the proceedings," was "unable to actively participate in the legal proceedings," and was "so substantially impaired as a result of

---

2/ Three reports were received by the trial court regarding competency and made a part of the record. The reports are included in the appendix to this petition. Dr. Baccus' report appears at 9a.

psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 10a.

Upon the basis of Dr. Baccus' report, petitioner entered a special plea of incompetency to stand trial and moved the court to transfer him to the Department of Human Resources for further evaluation. 3/ Prior to court action on this motion, petitioner was examined by Dr. Sheldon B. Cohen, M.D. Dr. Cohen reported in a letter to the trial judge that the petitioner was unable to provide him with "fundamental, historical information about his mother, four brothers and his work history." Dr. Cohen reported he was unable to make a definite diagnosis or state an opinion as to the competency of the petitioner. App. 11a-12a.

On August 10, after observing that "the Defendant may be presently incompetent to participate in his defense," the trial court ordered that petitioner be transferred to the Department of Human Resources. R. 13. Upon his transfer, an evaluation of the petitioner was conducted by the forensic services division of the Central State Hospital at Milledgeville, Georgia. The Court received a letter dated September 24, 1979, from Dr. Jose M. Delatorre, M.D., the medical director of the forensic services division at Central State. The petitioner was described as follows:

> On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process.

3/ Petitioner, through counsel, filed this motion on June 25, 1979. R. 8.

App. at 13a. The letter further stated that petitioner's condition had been diagnosed as "latent schizophrenia," but that he was considered competent to stand trial. The letter did not specify the psychological or personality tests administered to the petitioner, the names and professional qualifications of the personnel who evaluated him, the length of his stay at the hospital, or the length and number of observations of the petitioner by qualified mental health professionals. Beyond the paragraph quoted above, the report did not describe in any detail the mental and emotional makeup of the petitioner, how his emotional and intellectual processes work and their effect on his ability to understand the proceedings and communicate with his attorney, or any additional underlying facts upon which the conclusion as to the petitioner's competency was reached.

Despite the conflicting opinions as to the petitioner's competency and the questions raised by the observations contained in the letters of the three doctors to the court, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner to stand trial.

Trial commenced on October 22. During voir dire each venireperson was questioned individually as to his views on the death penalty. Upon each occasion when the state sought to remove a venireperson for cause based solely upon his view toward capital punishment, trial counsel noted his objection. 4/ During this process, several venirepersons were excluded in advance of any showing that they were either unalterably opposed to the death penalty or that such views would prohibit their impartial determination of guilt or innocence. The death-qualifying voir dire of the five jurors so excluded is appended to this petition at 30a.

At trial, the State presented a circumstantial case. The mother and a playmate of the nine-year-old decedent described the

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4/ Trial transcript [hereinafter "Tr."] 39, Tr. 75-76, Tr. 288.

disappearance of the decedent on April 11, 1979. Fifteen-year-old Linda Cook, petitioner's girlfriend, testified that two days after the decedent had disappeared, the petitioner returned to the room they shared with blood on his pants. Tr. at 350. 5/ She stated that petitioner took her to some railroad tracks where he showed her the body of the decedent and claimed he had killed him. Tr. at 352. While they were there, she testified, the petitioner jumped on the body, and then threw it in some bushes. Id. On cross examination, Ms. Cook admitted that she did not report this to the authorities for a week and did so only after she was charged with concealing a death. Tr. at 364-367. She also testified that petitioner had locked her into their room for the week proceeding April 13, leaving her a bucket for her wastes since she had no access to a bathroom. Tr. at 375-377.

Petitioner's stepfather, Enzor Lowe, testified that petitioner had told him on April 13 that he had killed a boy, but that he did not believe petitioner because petitioner was grinning and appeared "high." Tr. at 390. A medical examiner testified that the cause of death was asphyxiation due to neck trauma. Tr. at 435. He found both postmortem and antemortem injuries to the body. Tr. at 441, 446-447.

The State served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances set out in Ga. Code Ann. § 27-2534.1 (b)(7): "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Prior to trial, petitioner filed a motion to quash as unconstitutional the Georgia statutes providing for the imposition of the death penalty,

5/ The pants identified by Ms. Cook as those worn by petitioner were received in evidence. Tr. at 356, 480. Forensic serologist Linda Tilman testified that the blood on the pants was human blood of international blood group B type. Tr. at 464-465. However, no evidence was offered as to the blood type of the decedent.

and their application to this case. R. at 68. Petitioner objected to the validity and application of the aggravating circumstance statute because it allowed the jury subjective discretion in applying the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann. § 27-2537(f) and the due process clause of the Fourteenth Amendment.

Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550. The Court overruled the objection and in addressing the issue of an aggravating circumstance to the jury, instructed as follows:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566, App. at 15a-16a. The jury was not instructed as to what evidence it could properly consider in determining whether the statutory aggravating circumstance had been proven. And it was not given any limiting instruction with regard to its consideration of petitioner's prior convictions.

The jury returned a written verdict recommending death and stating its finding that the murder "was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind." Tr. at 571.

Petitioner noted a timely appeal of his conviction to the Supreme Court of Georgia. He asserted that the trial court erred in proceeding to trial without resolving the issue of his competency; that the jury was not selected in accordance with the principles set forth in Witherspoon v. Illinois, 391 U.S. 511 (1968), that the jury was not provided with an objective standard for determining whether aggravating circumstances existed which would permit imposition of the death penalty; and that the evidence did not support the finding that the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind." Ga. Code Ann. § 27-2534.1(b)(7).

The Georgia Supreme Court affirmed petitioner's conviction. With regard to the competency issue, the Supreme Court held:

> [T]he [trial] court did not find the appellant incompetent to stand trial, but stated . . . that the appellant "may be presently incompetent." The doctors at Central State . . . certified his competency to stand trial. The appellant was returned to Fulton County . . . and proceeded to trial without objection.

Thomas v. State, 245 Ga. 688, ___, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a.

The Georgia Supreme Court found petitioner's Witherspoon argument equally meritless. Without explaining the scope of its review of the record, the court held:

> It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings."

266 S.E. 2d at 502, App. at 4a.

In reviewing the death sentence, the Georgia Supreme Court

the Georgia Supreme Court upheld the guidance given to the jury, stating, "We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in Hawes v. State, 240 Ga. 327, 240 S.E.2d 883 [(1977)]; Fleming v. State, 240 Ga. 124, 240 S.E.2d 37 (1977)." 266 S.E.2d at 503, App. at 5a. The court did not elaborate. The Georgia Supreme Court also concluded that "a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind." Id.

This Court vacated the judgment of the Georgia Supreme Court and remanded the case to it for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980), on November 17, 1980. 6/ Petitioner then filed in the Georgia Supreme Court a motion for full briefing and for oral argument, which is appended to this petition at 20a. In the motion, petitioner asked for the opportunity to address the following issues: (1) whether he was entitled to a new sentencing hearing because the trial court failed to instruct the jury on the proper construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7); (2) whether the statutory provision was applied in an unconstitutionally vague or overbroad fashion in petitioner's case; and (3) whether the trial court's failure to conduct an evidentiary hearing and make findings on the issue of petitioner's mental competency deprived him of due process of law. The Georgia Supreme Court did not issue a ruling on the motion. However, without briefs or arguments, it issued an "addendum" to its opinion in which it upheld the death sentence imposed by the jury.

In the addendum, the Georgia Supreme Court distinguished

6/ Thomas v. Georgia, ___ U.S. ___, 101 S.Ct. 523, 66 L.Ed.2d 285 (1980).

this case from the facts of Godfrey v. Georgia, 7/ and found that the fact that the victim was beaten and choked to death would support a finding of serious physical abuse prior to death which, the Georgia Supreme Court has held, constitutes "torture." Thomas v. State, supra, 275 S.E.2d 318-19; Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), cert. denied ___ U.S. ___, 66 L.Ed.2d 611 (1981). The Georgia Supreme Court also held:

> In addition, the appellant had a large amount of blood on the front of his pants when he returned to the room where he kept [his girlfriend] and the victim's pants had been partially removed. The state further introduced the defendant's prior record for child molestation and assault with intent to rape during a pre-sentence hearing. Such evidence would authorize a finding of serious sexual abuse to the victim, which would constitute serious physical abuse.

275 S.E.2d at 319. The court did not elaborate on its conclusion that petitioner's prior convictions were evidence that the decedent was sexually abused.

Petitioner now seeks a writ of certiorari from this Court to review the decision of the Georgia Supreme Court.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

7/ The court stated: "This was not a domestic murder and the victim gave the appellant no reason to assault him nor was the victim subjecting the appellant to any emotional trauma. The appellant sought to avoid detection of his crime. See Godfrey v. Georgia, supra.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT EMPLOYED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE WORDS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING PETITIONER'S DEATH SENTENCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Petitioner's sentence of death rests upon a finding that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." This aggravating circumstance is set out in Georgia Code Ann. § 27-2534.1(b)(7). 8/ In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the statutory aggravating circumstance contained in section (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of section (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Despite the teaching of Gregg, Godfrey and Furman v. Georgia, 408 U.S. 238 (1972), the Georgia Supreme Court upon remand of this case for further consideration in light of Godfrey, defined and construed the terms of (b)(7) in such a way as to apply those terms to any assault of lethal magnitude. The question of whether the Georgia court is properly following Godfrey presents an important consitutional issue which should be settled by this Court. Therefore, a writ of certiorari should issue to review the decision of the Georgia Supreme Court.

8/ Ga. Code Ann. § 27-2534.1(b)(7) provides that the death penalty may be imposed if "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Petitioner's jury was not instructed with regard to aggravated battery.

In reaffirming the death penalty, the Georgia Supreme Court held that the jury was authorized to find torture because of serious physical and sexual abuse of the victim. It based its finding of serious physical abuse upon the fact that petitioner admitted that he killed the decedent by "beating him with a stick and choking him to death." 275 S.E.2d at 319. The only evidence as to the circumstances of death were provided by petitioner's fifteen-year-old girlfriend, who related the admission in her testimony, and the medical examiner. The medical examiner found antemortem bruises to the neck caused by strangulation which was the cause of death. Tr. 434, 435, 441. He also found two lacerations on the top of the head and minor bruises and abrasions on the arms and chest of the decedent. Tr. at 433. There was no testimony as to whether these injuries were sustained before or after death, although it appears from the testimony that some were postmortem. Tr. at 441. Thus, there was no evidence to suggest that the decedent was subject to prolonged physical abuse or pain prior to death which would authorize a finding beyond a reasonable doubt of torture. 9/

The Georgia Supreme Court based its finding of serious sexual abuse upon the petitioner's prior convictions for sex offenses and the fact that the pants of the decedent were partially removed when the body was discovered. This finding of sexual abuse was not made by the trial judge in his report to the Georgia Supreme Court 10/ and was only suggested as a possible motive by the

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9/ As this Court observed in Godfrey, supra, the Georgia court has held that "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Id. at 431 [emphasis added]. See also Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) cert. denied, ___ U.S. ___, 66 L.Ed.2d 611 (1981). In his report to the Georgia Supreme Court, the trial judge expressed his view that the death penalty was appropriate because of "Unexplained strangulation of a 9-year old child; brutality of child's corpse." Report of Trial Judge at 6. Supplemental R. 6. [Emphasis added].

10/ The trial judge reported to the Georgia Supreme Court that the murder was "unexplained." Report of Trial Judge at 6, Supplemental R. 6.

prosecutor at trial. 11/ There was no forensic evidence of sexual abuse of the decedent. The petitioner's girlfriend, who testified that petitioner showed her the corpse, did not testify that the pants were partially removed when she saw the body. Finally it should be noted that petitioner's prior convictions provide no basis for either the jury or the Georgia Supreme Court to infer that the crime was committed in a certain manner. 12/ The fact the Georgia Supreme Court found this to be a basis upon which the jury could have found sexual abuse beyond a reasonable doubt aptly demonstrates the failure of that court to employ a proper, narrow construction of the terms of section (b)(7).

Thus, the Georgia Supreme Court, in reviewing the sentence of death in petitioner's case, has applied a construction of the term "torture" which is so overly broad as to encompass any assault of lethal magnitude. As Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . . That interpretation would of course enable a jury to find a § (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). In petitioner's case and other cases considered in light of Godfrey, the Georgia Supreme Court has continued to apply such an

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11/ In her closing argument the prosecutor, after observing that she was not required to prove any motive but suggesting that the motive may have been sexual molestation, stated: "You can accept it or reject it. It may even have been a thrill killing. . . . He may have killed for the way he looked." Tr. at 510-511.

12/ The principle that "'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' has been so often judicially repeated that it is commonplace." 1 Wigmore, Evidence § 192 at 642 (3d ed. 1940) [citations omitted]; McCormick, Evidence § 157 (2d ed. 1972); 1 Underhill, Criminal Evidence §§ 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See, e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, ___ U.S. ___, 66 L.Ed.2d 250 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death); Brooks v. State, ___ Ga. ___, 271 S.E.2d 172, 173 (1980), cert. denied, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous; Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied ___ U.S. ___, 67L.Ed.2d 371 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture). 13/

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the Georgia court's construction of (b)(7) raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review that court's decision.

13/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg and Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevnes, JJ.); Godfrey, supra at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's case and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER IS ENTITLED TO A NEW SENTENCING HEARING AT WHICH CONSIDERATION OF THE SENTENCE OF DEATH IS PROPERLY GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed that it could impose the death penalty pursuant to Ga. Code Ann. § 27-2534.1(b)(7) if it found that the offense of murder was "outrageously and wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Tr. at 565-566, App. at 15a. The jury was provided with no definition of "torture" or any other terms of (b)(7) in the trial court's instructions. Nor was it instructed as to the limited purposes for which petitioner's prior convictions for child molestation and assault with intent to rape were admitted, assuming that those convictions were properly admitted at the sentencing hearing. 14/

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, supra, the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Godfrey v. Georgia, supra, at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.).

14/ Prior convictions provide no basis for imposing the death penalty pursuant to section (b)(7). Although such convictions might be properly admitted in rebuttal of evidence of mitigation or to impeach the credibility of the defendant if he testified, no evidence of mitigation was offered on behalf of petitioner and he did not testify. Thus, it appears that the prior convictions were not properly admitted at petitioner's sentencing hearing. But see Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Because petitioner's sentencing hearing before the Georgia trial court was constitutionally defective, it must be determined whether he is entitled under the Constitution to a new sentencing hearing at which the sentencer's discretion will be properly directed and channeled in accordance with Furman v. Georgia, supra, Gregg v. Georgia, supra, and Godfrey v. Georgia, supra. Although petitioner moved the Georgia Supreme Court for the opportunity to brief and to argue this issue, he was not given that opportunity by the court. The Georgia court did not discuss the issue in its addendum. Nevertheless, its reimposition of the death penalty without a hearing constitutes a determination that a new sentencing hearing is not required. Petitioner submits that this important constitutional issue should be settled by this Court.

Mr. Justice Marshall addressed the issue in his concurrence in Godfrey, expressing the view that only a properly instructed jury may impose the sentence of death: 15/

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

446 U.S. at 437 (Marshall, J., concurring). See also Davis v. Georgia, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (Marshall, J., dissenting from denial of certiorari); Hill v. Georgia, ___ U.S. ___, 49 U.S.L.W. 3785 (1981) (Marshall, J., dissenting from denial of certiorari); Willis v. Balkcom, ___ U.S. ___, 49 U.S.L.W. 3786 (1981) (Marshall, J., dissenting from denial of certiorari). The

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15/ Under Ga. Code Ann. §§ 26-3102, 27-2503(b) the sentencing authority in death cases is the jury.

exercise of such unbridled discretion cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court's speculation as to what the jury did find, what it could have found and what it was authorized to find based upon its review of a cold record is, therefore, inconsistent with this Court's opinions in Godfrey, Gregg and Furman. See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision of the Georgia Supreme Court.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT'S FAILURE TO PROVIDE PETITIONER A RIGHT TO BE HEARD ON REMAND VIOLATED HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Upon remand of this case to the Georgia Supreme Court, petitioner filed in that court a motion for full briefing and for oral argument on the issues of petitioner's sentence of death and his competency for trial. 16/ The Georgia Supreme Court apparently

16/ The motion is appended to this petition at 20a.

did not act on the motion, but issued an addendum to its opinion reimposing the death penalty without briefs or arguments. This Court should grant certiorari to determine whether such procedures are constitutionally sufficient.

This Court has cautioned that the "qualitative difference" under the Eighth Amendment between death and any other punishment requires a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific area." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Lockett v. Ohio, 438 U.S. 586, 601 (1978); Beck v. Alabama, 447 U.S. 625, 643 (1980). The cavalier summary disposition of petitioner's case on remand, without recognition or treatment of the important questions remaining after this Court's decision in Godfrey v. Georgia, supra, is inconsistent with this constitutional responsibility of the Georgia court.

Moreover, petitioner is entitled under the Sixth and Fourteenth Amendments to the effective assistance of counsel both in sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948), as well as on appeal, Douglas v. California, 372 U.S. 353 (1963). To be meaningful, this right must include the right to brief and to argue the important issues presented here to the Georgia Supreme Court before it reinstates the sentence of death.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), this Court observed that it "is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on a reason rather than caprice or emotion." The Georgia Supreme Court, no less than any other judicial component in the awesome process of determining life and death, is held to a higher standard under the Constitution than it met in petitioner's case below.

IV. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT AN EVIDENTIARY HEARING WAS REQUIRED WHERE THERE WAS SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which raised a substantial question as to petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The question of petitioner's competency arose almost immediately upon his indictment. The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence. 17/ On the basis of one opinion by a psychiatrist that petitioner was incompetent to stand trial, a special plea of incompetency was entered. At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and then jumping on the body. 18/ There was also evidence that petitioner admitted killing the decedent to his stepfather, but he was grinning and appeared "high" when doing so and was not believed. 19/

The Georgia Supreme Court rejected petitioner's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the court and, apparently, its view that petitioner may have waived the issue by

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17/ The three reports appear in the appendix to this brief at 9a-14a.

18/ Tr. at 352, 375-377.

19/ Tr. at 390.

proceeding to trial "without objection." Thomas v. State, 245 Ga. 688, ___, 266 S.E.2d 499, 502-03 (1980), App. at 4a-5a. In doing so, the Georgia Supreme Court sanctioned a marked departure from the holdings of this Court, other state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously guarded" this right, 20/ reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180. 21/

20/ Robinson, supra at 385, Drope, supra at 173.

21/ In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. 383 U.S. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court, including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972). 22/

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill. 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen,

22/ A trial court cannot delegate its responsibility to the state hospital to "certify" the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency . . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g., People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested. 23/

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

23/ But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540 cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

The Georgia Supreme Court's approval of the failure to conduct a competency hearing in this case is in conflict with these decisions. 24/ There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The report of Dr. Baccus, standing alone, provided a stronger indication of incompetency than was before the trial courts in either Robinson or Drope. 25/ But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, and there was evidence at trial of irrational and bizzare behavior on the part of the petitioner. 26/ Thus, the Georgia courts have failed to "jealously guard" the petitioner's right not to be tried or convicted while incompetent.

The Georgia Supreme Court's rejection of petitioner's assertions regarding competency also appears to be based upon a finding of waiver due to petitioner's failure to object to trial

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24/ Although Georgia Code § 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute. The statute is set out on pages 2-3 of this petition.

25/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

26/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetent to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

after his return from Central State Hospital. Even assuming that the Georgia court could properly find waiver despite the special plea of incompetency and the evidence before it, a holding that an incompetent defendant can waive his right to a determination of competency constitutes a significant departure from well established authority to the contrary and should be reviewed by this Court.

In Pate v. Robinson, this Court observed, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id. at 384. 27/ State and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it where evidence raising a question of competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where in a case decided before Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so. . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike petitioner, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-217, 153 N.W.2d at 342; People v. Livingston, supra, 57 Mich. App. at 726, 226 N.W.2d at 709-10.

Therefore petitioner respectfully submits that in this case the Georgia courts have failed to protect his right not to be tried or convicted while incompetent in violation of the due process

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27/ In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., dissenting).

guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

V. PETITIONER'S SENTENCE OF DEATH WAS IMPOSED BY A JURY SELECTED IN CONTRAVENTION OF THE PRINCIPLES ANNOUNCED IN WITHERSPOON V. ILLINOIS.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court held that "a State may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment." Adams v. Texas, 100 S.Ct. 2521, 2525 (1980). In holding that only venirepersons who maintain unalterable views toward the death penalty may be excluded purusant to due process, the court stated:

> Veniremen cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by State law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death penalty cannot be carried out, even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

391 U.S. at 522 N.21 [emphasis in original].

Since the announcement of Witherspoon, this Court has

repeatedly vacated penalties of death where the record did not unequivocally establish that Witherspoon standards were expressly satisfied. 28/ Just this past term, the Court struck down a practice which permitted the state to strike a venireperson for cause if he could not pledge that "the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." Adams v. Texas, supra at 2524. (Some venirepersons were struck because they indicated the death penalty would affect their deliberations while others were struck because "they were unable positively to state whether or not their deliberations would in any way be affected." 100 S.Ct. at 2528. In Boulden v. Holman, 394 U.S. 478 (1969), this Court held that the fact that some venirepersons acknowledged that they held fixed opinions against capital punishment was insufficient to satisfy Witherspoon as such jurors "might nevertheless be perfectly able as a juror to abide by existing law to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." 394 U.S. at 484. And in Davis v. Georgia, 429 U.S. 122 (1976), this Court held that even the exclusion of one venireperson in the absence of a showing that the venireperson was "irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings" rendered the sentence of death unconstitutional. 429 U.S. at 123. It is in light of this historical commitment to the command of Witherspoon that petitioner submits that several venirepersons were wrongfully excluded for cause from his jury.

28/ Davis v. Georgia, 429 U.S. 122 (1976); Aiken v. Washington, 403 U.S. 946 (1971); Adams v. Washington, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); Jaggers v. Kentucky, 403 U.S. 946 (1971); Childs v. North Carolina, 403 U.S. 948 (1971); Quintana v. Texas, 403 U.S. 947 (1971); Taira v. Illinois, 403 U.S. 947 (1971); Whan v. Texas, 403 U.S. 946 (1971); Speck v. Illinois, 403 U.S. 946 (1971); Mathis v. New Jersey, 403 U.S. 946 (1971); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Early into petitioner's voir dire, venireperson Francis Ogletree was questioned about her views toward capital punishment. 29/ When asked whether she was opposed to the death penalty, she responded in the affirmative, but clearly maintained that she would not automatically exclude its consideration and would consider the evidence of the case. With regard to whether these views would prevent her from making an impartial decision upon guilt or innocence, she simply responded, "I'm afraid it would." Over the objection of defense counsel, the trial court excused Mrs. Ogletree from petitioner's venire.

It is clear that Francis Ogletree was not unalterably opposed to the death penalty and her cryptic retort to the impartiality question hardly can be interpreted to mean only that she was certain she would not be impartial. Her response was of the character which this court has found insufficient for Witherspoon purposes on other occasions. See Wilson v. Florida, 403 U.S. 947 (1971) (reversing Wilson v. State, 225 So.2d 321 (Fla. 1969) (scruples "very well might" affect his verdict; "I believe I would have difficulty" in finding defendants guilty if the penalty may be death); Pruett v. Ohio, 403 U.S. 947 (1971)(reversing State v. Pruett, 18 Ohio St.2d 167, 248 N.E.2d 605 (1969) (scruples "very well might" affect his verdict; "I believe I would refuse to return a verdict of guilty where the penalty was death"). Additionally, she was not asked by the court whether in spite of her views she could follow an instruciton that she consider only the evidence presented at trial to determine petitioner's guilt. Because Mrs. Ogletree's exclusion was, in the least, premature, petitioner's rights pursuant to Witherspoon were infringed.

29/ Tr. at 37-39, App. at 30a-32a.

In another instance, the court, over defense objection, struck venireperson Joyce Beachum despite several assurances that she was not irrevocably opposed to the death sentence and could be impartial with regard to petitioner's guilt or innocence. Tr. at 68-76, App. at 33a-41a. When first asked about her views on the death penalty by the court, Mrs. Beachum responded that she had never thought about it. Upon being asked whether she would automatically vote against imposition of the penalty she stated, "No." She then retorted that her attitude would not prevent her from making an impartial decision upon guilt or innocence. Not satisfied with these responses, the prosecutor asked a series of questions in the vein of whether Mrs. Beachum could "write out a death sentence on a person." While stating she did not think she could write it out or help impose it, 30/ she did say she could "consider imposing it" but could not vote for it.

Upon questioning by defense counsel, Mrs. Beachum then simply stated she was conscientiously opposed to capital punishment. Once again the court sought to determine Mrs. Beachum's tr... attitudes.

> Court: . . . is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?
>
> Mrs. Beachum: No.
>
> Court: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?
>
> Mrs. Beachum: Yes.

Tr. at 72, App. at 37a. The court then reminded Mrs. Beachum that capital punishment in Georgia meant electrocution and she responded that she understood. And finally, after being asked the impartiality question, she again responded, "I think I could make a fair judgment." Tr. at 73, App. at 38a.

30/ It is not clear what the prosecutor had in mind with the phrase "imposing it" and it is certainly not clear how Mrs. Beachum interpreted it.

At this point, the government asserted its claim that Mrs. Beachum should be struck for cause. After defense objection, the court proceeded with further inquiry. Again, Mrs. Beachum asserted that she could impose the death penalty, if it was the last alternative. Finally, in response to the court's question of whether there was any case she could conceive of where she would vote to send someone to the electric chair, she responded, "No."

The court understood this last answer to mean Mrs. Beachum was unalterably opposed to capital punishment ("I know what she has done. She has said three or four different things, but the last time she said she could not." Tr. at 75, App. at 40a). Upon the government's motion to strike for cause, the court granted the motion and commented:

> Well, I think, as a matter of fact, I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending someone to the electric chair to be executed her ambiguity seems to fade away.

Tr. at 76, App. at 41a. [Emphasis added].

Despite her repeated assurances that she could be impartial and could impose the penalty, the court chose to disregard these clear indicia of Mrs. Beachum's attitude and found her irrevocably opposed to the death penalty on the basis of his last inquiry. Yet the court did not ask her whether she was unalterably opposed to the death sentence during his final questions; he instead asked her whether she could conceive of a case where she would vote for the sentence of execution. In responding no, Mrs. Beachum's inability to immediately provide an example does not necessarily indicate that she could never vote for capital punishment. Indeed, in light of her prior answers, Mrs. Beachum's response can best be interpreted only to mean that at that moment she could not describe a case where she would, without doubt, vote for the sentence of execution. Whether a

juror can dream up a circumstance which would warrant capital punishment is not the question. It is instead whether the attitude of the juror will preempt altogether any consideration of the death penalty or interfere with an impartial determination of guilt or innocence. With regard to these two inquiries, Mrs. Beachum was clear: she was not irrevocably opposed to the penalty and she could be impartial. The court's striking her for cause thereby offended petitioner's rights pursuant to Witherspoon. 31/

In summary, petitioner was denied his Sixth and Fourteenth Amendment rights in that venirepersons were excluded from his jury simply because they expressed varying degrees of doubt about whether they could vote to impose a sentence of death upon another human being. The Constitution, as interpreted in Witherspoon through Adams v. Texas, permits such exclusion only if the venireperson clearly indicates a total repudiation of the penalty or an unalterable view that such feelings will preclude an impartial decision upon the merits of the case. As this Court has repeatedly stressed the clear parameters of Witherspoon, petitioner prays that this Court grant his petition and summarily reverse his sentence of death.

31/ Several other venirepersons were struck before a satisfactory Witherspoon predicate had been established. Evelyn Thompson was excused after she stated she was not sure what capital punishment meant, that she would not automatically vote against it, but that she was afraid that she would be unable to remain impartial. Tr. at 114. Both Christine Rease and Eddie Watkins were excused after giving contradictory and ambiguous remarks. Ms. Reese said she could consider the death penalty and could be impartial yet responded no when asked if she could send someone to the electric chair. Tr. at 286-288. Mr. Watkins expressed a reluctance to impose a sentence of electrocution; he stated he could be impartial yet then stated he could not vote for a sentence if it meant electrocution. Tr. at 77. Immediately after Mr. Watkins' voir dire, the trial court remarked that he was going to inform each venire person before questioning that they would be questioned as to their views on the death sentence "so that they can be thinking about that, and don't get hit, maybe, cold." Tr. at 78. The death-qualifying voir dire of these jurors is appended to this petition at 30a-50a.

CONCLUSION

Petitioner prays that a writ issue to review the judgment of the Supreme Court of Georgia.

Respectfully submitted,

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80-6604

No. 80-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DONALD WAYNE THOMAS,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Supreme Court of Georgia is reported as follows at 266 S.E.2d 499:

THOMAS

v.

The STATE.

No. 36046.

Supreme Court of Georgia.

Argued March 12, 1980.

Decided April 23, 1980.

Defendant was convicted on a jury verdict before the Fulton Superior Court, Weltner, J., of murder and was sentenced to death, and he appealed. The Supreme Court, Marshall, J., held that: (1) evidence was sufficient to support conviction; (2) trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings; (3) death qualification voir dire question did not violate defendant's right to an impartial jury and was not unconstitutional; (4) defendant was not put to trial while still under outstanding order of incompetency; (5) defendant waived his right to appeal any error in trial court's instruction to the jury to scan with care any incriminating statements made by witness; and (6) evidence supported jury's finding that the murder was outrageously and wantonly violent and inhuman in that it involved torture and depravity of mind so as to support imposition of the death penalty.

Judgment affirmed.

Hill, J., filed concurring opinion.

1. Criminal Law ⇐742(1)

Credibility of witnesses is matter left to the jury. Code, § 38-1805.

2. Homicide ⇐250

Evidence, viewed in the light most favorable to the verdict, supported finding by rational trier of fact of essential elements of crime of murder beyond a reasonable doubt.

3. Jury ⇐108

In prosecution for murder, trial court did not err in excusing jurors who were irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. Code, § 59-806, subd. 4.

4. Jury ⇐131(8)

In prosecution for murder, "death qualification voir dire question" did not violate defendant's right to impartial jury on ground that it excluded identifiable segment of the community. Code, § 59-806, subd. 4.

5. Jury ⇐84

Statute providing for "death qualification voir dire question" is not unconstitutional on the ground that it does not meet constitutional standards of specificity and clarity in determining view of potential juror toward the death penalty. Code, § 59-806, subd. 4.

6. Criminal Law ⇐1213

Georgia death penalty statute is not unconstitutional.

7. Witnesses ⇐306

Privilege against self-incrimination is that of the person under examination as a witness and is intended for his protection only; defendant on trial had no standing to raise the issue.

8. Witnesses ⇐296

Witness cannot refuse to testify relative to material matters concerning crime committed by member of his family on basis that his answer would bring disgrace, infamy, or public contempt upon him or his family. Code, § 38-1205(a).

9. Mental Health ⇐6

Where, in response to a special plea of insanity, defendant was examined by two psychiatrists who tendered conflicting reports, defendant was then transferred for examination by hospital staff by the court which stated that the reason for the transfer was that defendant might be presently incompetent, and doctors at state hospital, after examining the defendant, certified his competency to stand trial, defendant was not put to trial for murder while still under outstanding order of incompetency.

10. Criminal Law ⇐1137(1)

Where defense counsel requests giving of certain jury charge but agrees to trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced and cannot be complained of on appeal.

11. Criminal Law ⇐1137(1)

Defendant would not be permitted to assert on appeal error in jury instruction, where trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by witness, but the term "confession" would not be used in the jury instructions, and defense counsel agreed to the trial judge's giving of this modified version of defendant's requested charge.

12. Criminal Law ⇐1206(2)
Homicide ⇐354

Evidence which showed brutal strangulation murder of nine-year-old victim who weighed less than 60 pounds and admission by defendant to witness that defendant had killed the child by beating him with a stick and choking him to death supported jury's finding beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind, so as to support imposition of the death penalty; sentence to death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code, §§ 27-2534.1(b)(7), 27-2537(c)(1-3).

Jack Dorsey, Atlanta, for appellant.

Lewis R. Slaton, Dist. Atty., Carole E. Wall, Asst. Dist. Atty., Arthur K. Bolton, Atty. Gen., W. Davis Hewitt, Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

Donald Wayne Thomas, the appellant, was convicted in Fulton County Superior Court of the April 19, 1979, murder of Dewey Baugus, a nine-year-old child. He was sentenced to death, and this is his appeal.

From the evidence introduced at trial, the jury was authorized to find the following facts:

On April 11, 1979, Dewey Baugus and a playmate left his mother's home on Primrose Circle in Atlanta to go to a ball game. After the game, the two children separated to return to their respective homes in the early evening darkness. This was the last time the victim was seen alive.

The appellant, a 19-year-old male, lived at a rooming house on Primrose Circle. Linda Cook, the appellant's girlfriend, had stayed with him for approximately a week during the time in question. The appellant had kept her locked in the room when he was not there, with a bucket he provided as her only toilet facility. Linda Cook testified that when the appellant returned to the room on Friday, April 13, she noticed that he had a lot of blood on the front of his pants. The appellant took her to the railroad tracks behind Primrose Circle and showed her the body of the victim, lying face down, and told her that he had killed the child by beating him with a stick and choking him. In her presence, the appellant rolled the body over. Telling her that he had to make sure that he was dead, the appellant then jumped on the neck of the victim. Thereafter, he threw the victim's body in the bushes. Thereafter, they returned to the room, where the appellant removed his pants and hid them behind the house. That same day, the appellant, again in Linda Cook's presence, admitted the murder to his stepfather, Enzor Lowe. However, his stepfather testified that he did not believe him, because the appellant was grinning about it.

On April 19, 1979, Calvin Banks discovered the body of the victim when he took a shortcut on his way back from applying for a job at the Dolly Madison Cake Co. When the body was discovered, it was partially decomposed, and the pants the victim was wearing were pulled down to mid-thigh level.

Sometime later, after she had stopped staying with the appellant, Linda Cook contacted the authorities and related what had occurred. She was charged with concealing a death and placed in juvenile detention. She pointed out to the authorities where the appellant had discarded his pants, and they were recovered. Crime Laboratory tests confirmed that the blood on the appellant's pants was human, International Type B. The blood type of the victim could not be established due to decay.

Autopsy results showed the cause of death as asphyxiation, and that numerous post- and ante-mortem bruises were on the body.

[1] In enumerations of error 1, 2 and 10, the appellant urges the general grounds. He argues that the evidence does not support the verdict in that the evidence was circumstantial and did not exclude every reasonable hypothesis save the guilt of the accused. However, the jury was fully charged on circumstantial evidence and the reasonable-hypothesis rule pursuant to Code § 38-109. We do not find from the evidence, or from the lack of evidence, an hypothesis pointing to the innocence of the accused. *Douthit v. State*, 239 Ga. 81(1), 235 S.E.2d 493 (1977). See *Hawes v. State*, 240 Ga. 327(3), 240 S.E.2d 833 (1977); *Corn v. State*, 240 Ga. 130(5), 240 S.E.2d 694 (1977). The credibility of witnesses is a matter left to the jury. Code § 38-1805; *Turner v. State*, 235 Ga. 826(1), 221 S.E.2d 590 (1976).

[2] We find that the evidence, viewed in the light most favorable to the verdict, supports a finding by a rational trier of fact of the essential elements of the crime of murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980); *Fleming v. State*, 236 Ga. 434, 224 S.E.2d 15 (1976).

[3] 2. The appellant contends in his third and eighth enumerations of error that the trial court erred in excusing jurors who were conscientiously opposed to the death penalty and in overruling the appellant's motion to "strike or quash" the Georgia statute providing for death-qualification voir dire questions (Code Ann. § 59-806(4)). We do not agree. It is clear from the voir dire examination that the jurors excused were "irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Ward v. State*, 239 Ga. 205, 236 S.E.2d 365 (1977).

[4] The appellant's assertion that the "death qualification voir dire question" (Code Ann. § 59-806(4)) violates the defendant's right to an impartial jury in that it excludes an identifiable segment of the community, has been raised numerous times before this court, and in each instance has been rejected. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694, supra; *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493, supra; *Porter v. State*, 237 Ga. 580, 229 S.E.2d 384 (1976).

[5] The appellant's contention that Code Ann. § 59-806(4) is unconstitutional in that it does not meet the constitutional standards of specificity and clarity in determining the view of the potential juror toward the death penalty, is clearly without merit, as the statute must be construed in light of the applicable case law. *Witherspoon v. Illinois*, supra. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[6] 3. The constitutionality of the Georgia death penalty statute has been upheld by the Supreme Court of the United States and by this court each time it has been attacked on constitutional grounds. *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729, supra, and cits. The appellant's ninth enumeration of error is without merit.

[7, 8] 4. The appellant made a motion for the court in camera to inform witness Enzor Lowe of his privilege not to testify as to matters which may incriminate himself or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family. Code § 38-1205(a). The appellant argues that, since the witness was the stepfather of the appellant, the stepfather's testimony as to the murder would bring infamy upon a member of his household and the court should have instructed him in this regard. However, this enumeration is without merit for two reasons. First, the privilege against self-incrimination is that of the person under examination as a witness, and is intended for his protection only; the defendant on trial has no standing to raise the issue. *Lively v. State*, 237 Ga. 35, 226 S.E.2d 581 (1976) and cits. Second, the privilege would not apply to the testimony of the witness in this case, in that a witness cannot refuse to testify relative to material matters concerning a crime committed by a member of his family on the basis that his answer would bring disgrace, infamy or public contempt upon him or his family. *Brooks v. State*, 233 Ga. 524(2), 212 S.E.2d 355 (1975).

[9] 5. The appellant complains that he was put to trial while still under an outstanding order of incompetency. However, the record does not support such a contention. In response to a special plea of insanity, the appellant was examined by two psychiatrists, who tendered conflicting reports. The court thereafter ordered that the appellant be transferred to the custody of the Department of Human Resources in order that he could be examined by the staff at Central State Hospital. In its order, the court did not find the appellant incompetent to stand trial, but stated that the reason for the transfer was that the appellant "may be presently incompetent." The doctors at Central State, after examining the appellant, certified his competency to stand trial. The appellant was returned to Fulton

County, tendered a plea of not guilty, and proceeded to trial without objection. The appellant's fifth enumeration of error is therefore without merit.

6. In his seventh enumeration of error, the appellant assigns error to the court's failure to charge, in the language requested, the appellant's request to charge number 12, which reads as follows: "All statements shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify conviction."

The appellant did not give any statements to law enforcement authorities; nor did he testify at trial. The appellant did make certain admissions to Linda Cook and his stepfather concerning his commission of the murder, and their testimony concerning these admissions was received at trial.

[10, 11] Prior to closing argument, the trial judge informed defense counsel that he would instruct the jury to scan with care any incriminating statements made by Linda Cook, but the term "confession" would not be used in the jury instructions. Defense counsel agreed to the trial judge's giving of this modified version of defendant's request to charge number 12. Therefore, he cannot complain on appeal. Where defense counsel requests the giving of a certain jury charge, but agrees to the trial judge's giving of another charge in lieu thereof, any error in the charge given is in effect induced. Induced error cannot be complained of on appeal. *Hill v. State*, 237 Ga. 523(3), 228 S.E.2d 898 (1976).

[12] 7. *Sentence Review.* As required by Ga.L.1973, p. 159 et seq. (Code Ann. § 27-2537(c)(1-3)) and to complete our consideration of the appellant's enumerations of error, we have reviewed the death sentence in this case, as we review each case in which a death sentence is imposed. We have considered the aggravating circumstance found by the jury and the evidence concerning the crime and the defendant. We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor, and is factually substantiated.

The jury in returning the death sentence found the following statutory aggravating circumstance: That the strangling of a nine-year-old child was outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind. Code Ann. § 27-2534.1(b)(7). The appellant, in his sixth enumeration of error, argues that the evidence does not support such a finding. We do not agree. The evidence shows a brutal strangulation murder of a nine-year-old child who weighed less than 60 pounds. The appellant admitted to Linda Cook that he had killed the child by beating him with a stick and choking him to death. The autopsy report showed numerous post-mortem bruises and lacerations. The appellant had a large amount of blood on the front of his pants when he returned to the room where he kept Linda Cook. The victim's pants had been partially removed and the state introduced the defendant's prior record for child molestation and assault with intent to rape during the pre-sentence hearing. Nothing could be more inhuman, depraved or outrageously vile than the killing of a helpless child under these circumstances. This child's murder certainly involved torture of the most sadistic kind. From this evidence, a rational trier of fact was authorized to find beyond a reasonable doubt that the murder was outrageously and wantonly vile and inhuman in that it involved torture and depravity of mind. *Jackson v. Virginia*, supra. See *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979).

We have reviewed the trial court's instructions to the jury during the sentencing phase of the trial and find them free of the defects dealt with in *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, supra; *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977).

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which life or death sentences were imposed. We find that the following similar cases listed in the appendix support affirmance of the

death penalty. The appellant's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Judgment affirmed.

All the Justices concur.

APPENDIX.

House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974); *Jarrell v. State*, 234 Ga. 410, 216 S.E.2d 258 (1975); *Gibson v. State*, 236 Ga. 874, 226 S.E.2d 63 (1976); *Moore v. State*, 240 Ga. 807, 243 S.E.2d 1 (1978); *Stevens v. State*, 242 Ga. 34, 247 S.E.2d 838 (1978); *Johnson v. State*, 242 Ga. 649, 250 S.E.2d 394 (1978); *Presnell v. State*, 243 Ga. 131, 252 S.E.2d 625 (1979); *Collins v. State*, 243 Ga. 291, 253 S.E.2d 729 (1979); *Bowen v. State*, 244 Ga. 495, 260 S.E.2d 909 (1979); *Brooks v. State*, 244 Ga. 574, 261 S.E.2d 379 (1979); *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979); *Tucker v. State*, 244 Ga. 721, 261 S.E.2d 635 (1979); *Tucker v. State*, 245 Ga. 68, 263 S.E.2d 109 (1979); *Patrick v. State*, 245 Ga. 417, 265 S.E.2d 553 (1980).

HILL, Justice, concurring.

The defendant requested that the jury be instructed substantially in accordance with Code § 38-420 regarding "confessions." The trial court charged the jury as to "incriminating statements."

For the last 100 years, defendants have been complaining that the defendant was prejudiced by the court's charging the jury as to "confessions." *Johnson v. State*, 242 Ga. 822, 824, 251 S.E.2d 563 (Hill, J., concurring) (1979). Here the defendant requested a charge on "confessions."

While I concur in Division 6 of the majority opinion, I would go further and hold that a defendant cannot complain that the trial court charged on "incriminating statements" rather than on "confessions"; i. e., that the trial court charged that incriminating statements should be scanned with care and shall be received with great caution.

In the case at bar, the defendant's statements were more than amply corroborated by the blood on defendant's clothes and by his taking Linda Cook to view the body. I therefore concur in the judgment.

THOMAS

v.

The STATE.

No. 36046.

Supreme Court of Georgia.

March 3, 1981.

Defendant was convicted of murder and sentenced to death by the Superior Court, Fulton County, Charles L. Weltner, J. The Supreme Court, 245 Ga. 688, 266 S.E.2d 499, affirmed, and the United States Supreme Court, — U.S. —, 101 S.Ct. 523, 66 L.Ed.2d 285, vacated and remanded. The Supreme Court held that: (1) a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a "depraved mind" for purposes of statute allowing imposition of death penalty, and (2) evidence that defendant killed 9-year-old child by beating him with a stick and choking him to death supported finding that the child suffered serious physical abuse prior to death, a statutory aggravating circumstance justifying imposition of death penalty.

Judgment affirming death sentence reaffirmed.

1. Homicide ⇐354

A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a "depraved mind," for purposes of statute allowing imposition of death penalty when a murder involves torture or depravity of mind. Code, § 27-2534.1(b)(7).

2. Homicide ⇐354

Evidence in prosecution for homicide that defendant killed 9-year-old child by beating him with a stick and choking him to death, supported finding that the child suffered serious physical abuse prior to death, a statutory aggravating circumstance justifying imposition of death penalty. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354

Evidence in prosecution for homicide that defendant had a prior record for child molestation and assault with intent to rape, that defendant had a large amount of blood on the front of his pants following murder of victim, and that the victim's pants had been partially removed supported finding that the victim had suffered serious sexual abuse, which constituted serious physical abuse, a statutory aggravating circumstance justifying imposition of death penalty. Code, § 27-2534.1(b)(7).

Jack Dorsey, Atlanta, Stephen B. Bright, George H. Kendall, Canon, Burns & O'Toole, Washington, for Thomas.

Lewis R. Slaton, Dist. Atty., Carole Wall, Asst. Dist. Atty., Atlanta, Arthur K. Bolton, Atty. Gen., W. Davis Hewitt, Asst. Atty. Gen., for State.

ADDENDUM

By its order of November 17, 1980, the Supreme Court of the United States, — U.S. —, 101 S.Ct. 523, 66 L.Ed.2d 285, vacated this court's judgment in this case as to the death sentence [245 Ga. 688, 266 S.E.2d 499 (1980)] and remanded for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). As mandated by order of the Supreme Court of the United States, this court has reexamined the holding in this case that the evidence supports a reasonable trier of facts' finding beyond a reasonable doubt that the appellant's murder of the victim was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind. Code Ann. § 27-2534.1(b)(7).

[1] In *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980), this court set out standards which must be met in order to constitutionally apply Code Ann. § 27-2534.1(b)(7) in light of *Godfrey v. Georgia*, supra. We held that "torture," as the term is used in the statute, occurs when the victim is

subjected, as in this case, to serious physical abuse prior to death. Furthermore, this court held that serious sexual abuse may be found to constitute serious physical abuse. A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. The age and physical characteristics of the victim may be considered in determining "depravity of mind."

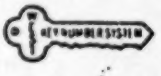
By any rational standard, the murder in this case was outrageously or wantonly vile, horrible or inhuman. In that respect, this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. *Godfrey v. Georgia*, supra; *Hance v. State*, supra; *Cape v. State*, 246 Ga. 520, 272 S.E.2d 487 (1980). This was not a domestic murder and the victim gave the appellant no reason to assault him nor was the victim subjecting the appellant to any emotional trauma. The appellant sought to avoid detection of his crime. See *Godfrey v. Georgia*, supra.

[2, 3] As was set out in the opinion in this case, the evidence shows a brutal strangulation murder of a nine-year-old child who weighed less than 60 pounds. The appellant admitted that he had killed the child by beating him with a stick and choking him to death. Such evidence would support a finding by a rational trier of fact of serious physical abuse prior to death. Later, the appellant took his girl friend to the site of the killing and showed her the body of the victim. In her presence, the appellant rolled the body over and, telling her that he had to make sure that he was dead, the appellant jumped on the neck of the victim and then threw the victim's body in the bushes. See *Hance v. State*, supra; *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980). In addition, the appellant had a large amount of blood on the front of his pants when he returned to the room where he kept Linda Cook, and the victim's pants had been partially removed. The state further introduced the defendant's prior record for child molestation and assault with intent to rape during a pre-sentence hearing. Such evidence would authorize a finding of serious sexual abuse to the victim, which would constitute serious physical abuse. *Cape v. State*, supra.[1] In this case, the jury's finding of the statutory aggravating circumstance is complete and supported by the evidence beyond a reasonable doubt. Speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review of the death sentence. See *Godfrey v. Georgia*, supra.

Accordingly, we hold that the jury was authorized to find, consistent with the United States Supreme Court's holding in *Godfrey* and beyond a reasonable doubt, that the appellant's murder of the young child was outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind.

Judgment affirming the death sentence is reaffirmed.

All the Justices concur.



HARDY

v.

The STATE.

No. 35588.

Supreme Court of Georgia.

March 3, 1981.

On appeal of defendant's conviction for murder and his death sentence, the Supreme Court, 245 Ga. 272, 264 S.E.2d 209, affirmed. The Supreme Court of the United States, — U.S. ——, 101 S.Ct. 523, 66

1. See *House v. State*, 232 Ga. 140, 205 S.E.2d 217 (1974) and *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977), cited in *Godfrey v. Georgia*, supra.

Grady Memorial Hospital

June 4, 1979

80 Butler Street, SE, Atlanta, Georgia 30303, Telephone 404 659-1212

J W Ponsolle, Jr
Executive Director

Asa G Yancey, M D
Medical Director

Weston D Benyman, Jr
Assistant Director
Administrative Services

Thomas L Collier
Assistant Administrator
Hughes Spalding Pavilion

T E Garner Jr
Assistant Director
Administrative Services

Frank K Lawlor
Assistant Director
Professional Services

Robert L Parham, Jr
Assistant Director
Ambulatory Care

E R White
Assistant Director
Fiscal Affairs

Charles H Wilson, Jr
Administrator
Hughes Spalding Pavilion

Mary F Woody, R N
Assistant Director
Director of Nursing

To call 6-25

The Honorable Charles L. Weltner, Judge
Fulton County Superior Court
Atlanta Judicial Circuit
136 Pryor Street, SW
Atlanta, Georgia 30303

Re: Mr. Donald Wayne Thomas

Dear Judge Weltner:

Mr. Donald Wayne Thomas, Indictment #A-44518, was evaluated on June 1, 1979 pursuant to a court order received on May 23, 1979. The following comments reflect a summary of the observations obtained during the course of the interview with Mr. Thomas. There was no additional history or background information available at the time of the evaluation.

PURPOSE OF EVALUATION: Mr. Thomas was informed that the evaluation had been requested by the court and that a summary of observations would be forwarded to the court for its potential use in the disposition of his case. In response to a question regarding his understanding of the charges against him, he stated "I turned myself in on an assault case and they came out here and said I killed a little white boy."

MENTAL STATUS EXAMINATION: Mr. Thomas presented as an alert, rather slender black male dressed in an institutional green jumpsuit, unkempt in his appearance and exhibiting poor personal hygiene. He sat rigidly in his chair staring past the examiner and demonstrated little spontaneity in response to questions. He stated that he had no idea of the month or the day and when asked the year he acknowledged his identity and stated that "I'm in the jail, big rock jail in Atlanta." His speech was characterized by tangential to loose associations, however, he denied experiencing delusional ideations and/or perceptual distortions in the form of either auditory of visual hallucinations. His affect was markedly flattened and his mood was depressed, without evidence of overt suicidal or homicidal ideation. As the interview progressed, and he was questioned more closely regarding his current mental status, he became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands. His objective judgment was determined to be significantly impaired as a result of his markedly inappropriate behavior. His insight was considered to be nil. As a result of his inability to respond to questioning, the clinical interview was terminated.

I was unable to elicit any substantial family or personal history as a result of his mental status, however the above noted observations are clearly indicative of a diagnosis of Schizophrenia. In the absence of history to the contrary, I must assume that this psychotic behavior is a manifestation of an acute process. Clinical recommendations would include the transfer of Mr. Thomas to an inpatient psychiatric facility in the interest of eliminating his psychotic symptoms. He was placed on Thorazine

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FULTON COUNTY GEORGIA

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50 mgs. twice a day at the close of the interview.

FORENSIC CONSIDERATIONS: Mr. Thomas appeared aware of the charges against him, however as a result of his psychotic state, he did not appear to appreciate his role in the proceedings pending before him nor was he able to communicate effectively with this examiner. It is my impression that Mr. Thomas, as a result of psychotic decompensation, is unable to actively participate in the legal proceedings against him and is so substantially impaired as a result of psychiatric symptoms as to be unable to assist his attorney in the preparation and implementation of his defense.

I am unable to offer an opinion regarding his mental status at the time of the alleged offenses, as his state of disorganization was of such a degree that he was unable to offer any coherent statements regarding the offense.

Respectfully,

Lloyd T. Baccus, M.D.
Director, Inpatient Psychiatry
Psychiatry & Law Service

LTB:reb

cc: Ms. Carole E. Wall
Asst. District Attorney

Mr. Robert M. Coker
Public Defender

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SHELDON B. COHEN, M. D.
804 PEACHTREE MEDICAL BUILDING
401 PEACHTREE STREET, N. E.
ATLANTA, GEORGIA 30308

Telephone 525-6138

August 8, 1979

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Fulton County Courthouse
Atlanta, Georgia 30303

Re: Donald Wayne Thomas
Indictment No. A-44518

Dear Judge Weltner:

Pursuant to your order of 7 August 1979, Mr. Thomas, who is accused of murder, was seen in psychiatric consultation to determine his capacity to cooperate meaningfully with counsel and to stand trial.

Mr. Thomas was brought to my office ahead of time by two Sheriff's deputies. He sat quietly in the waiting room until I called him. He is a 19 year old, single, Negro male who apparently had been employed regularly as an unskilled laborer in a restaurant for several years.

I explained the purpose of the interview and asked him what he understood it to be and he said, "You are supposed to be a doctor and they say I am crazy, I reckon." However, he said he didn't think he was crazy. He said that he had been in jail for some time, having given himself up "for an assault case." He said that he knew he had done something wrong and he wanted to get it over with.

When asked for details of the assault charges, he said that it was over with, that it was in the past and he did not want to talk about it. When asked about murder charges, he stated that he had been in court on the assault charges and that someone telephoned the court saying that he had committed murder, that they went out and looked for the body and found it. He said the call must have been from someone who did not like him and that he did not have anything to do with this incident, that he had been in jail at the time. He continually denied knowing anything about the murder of a nine year old white boy and strongly implied that many of his difficulties were because his ex-girl friend, Linda Cook, was angry with him and would do anything to hurt him. He said this was because of urinary incontinence present for seven years and that she and others made fun of him because of this.

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FULTON COUNTY GEORGIA

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He was able to give me fundamental, historical information about his mother, four brothers and his work history.

During the interview he was at times angry, negativistic and provocative; for example, smoking a cigaret in the waiting room despite a sign on the door asking people to not smoke. He initially seemed to be pretending not to understand or comprehend anything that was asked of him; for example, when asked if he would like a Coca-Cola or coffee, he looked up and said, "What is that?" Later, as he began talking and became less defensive it was quite apparent that he was very much aware of such phenomenon and he asked if he could have a piece of candy which he noted in a jar in my office.

The interview conducted by Dr. Baccus in early June showed apparently quite different behavior, so that he seemed unresponsive to simple, every day questions. He apparently was placed on a tranquilizer (Thorazene 100 mgs. daily) and this may account for the difference in manner and behavior at this time. It is of course also possible that he may have simulated more in the previous interview than he did today.

At this time I cannot arrive at either a definitive diagnosis or answer the questions as to his mental capacity to assist in his own defense and to stand trial. There is conflicting information from the Grady interview and that which I obtained today. Consequently, I would recommend extended observation at Central State Hospital in order to clarify these factors.

Thanking you for asking me to see Mr. Thomas, I am

Sincerely,

Sheldon B. Cohen

Sheldon B. Cohen, M. D.

SBC:hcm
Encl.

FORENSIC SERVICES DIVISION

CENTRAL STATE HOSPITAL

Milledgeville, Georgia 31062

September 24, 1979

(912) 453-4381

A 44518

Honorable Charles L. Weltner
Judge, Superior Court
Atlanta Judicial Circuit
Courthouse
Atlanta, Georgia 30303

Re: Thomas, Donald Wayne
Case No. 228,112
Fulton County
Binion 2 South

Dear Judge Weltner:

Mr. Donald Wayne Thomas was admitted to the Forensic Services Division of Central State Hospital on August 27, 1979 by Order of your Court. We understand that he is charged with Murder. Your Order states that the defendant may be presently incompetent to participate in his defense and that because of conflicting reports from two other psychiatrists, further evaluation by the court is requested.

The physical examination was unremarkable. Neurological examination including brain scan, skull series, electroencephalogram and neurological consultation are all within normal limits. All routine laboratory procedures were within normal limits. The chest x-ray was negative. Although Mr. Thomas has had vague urinary complaints, his urinalysis has been within normal limits.

On admission, Mr. Thomas was noted to be tense, anxious and nervous. His speech was logical, relevant, coherent and goal directed. However, he was somewhat guarded and did not volunteer any information. His psychomotor activity was a little decreased and he spoke in a very low tone. His affect was somewhat flat. He was partially oriented. He denied hallucinations, delusions and suicidal thoughts. Psychological testing reveals he functions in the Borderline range of intelligence. Personality testing suggests the presence of a thought disorder, which resembles that of a schizophrenic process. Based on our examination, evaluation, and information available to us, he has been given the diagnosis of Latent Schizophrenia. He gives no other history of psychiatric treatment.

Based on our examination and evaluation, we have concluded that he is aware of the charge pending against him and the possible consequences. He is able to relate to his attorney in the preparation of his defense. Therefore, we consider him competent to stand trial.

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FULTON COUNTY GEORGIA

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As to his degree of criminal responsibility, it is our opinion that he is able to distinguish between right and wrong, and was not acting under the influence of a compulsive delusion which overmastered his will to resist committing the alleged offense.

Please send a duly authorized person for him at your earliest convenience.

Very truly yours,

Jose M. Delatorre, M.D.
Medical Director
Forensic Services Division

JMD:id

cc: Honorable Lewis R. Slaton (Enclosed)
Defense Counsel (Enclosed)

BOOK 887 PAGE 34

[INSTRUCTIONS PRIOR TO PENALTY PHASE OF TRIAL:]

THE COURT: Members of the jury, it is my duty as the Presiding Judge to instruct you now as to the law governing the sentencing phase of this case. The instructions given you earlier in this case and the rules of law outlined to you in this portion of the instructions apply also to your deliberations as to penalty.

The law of Georgia provides that the death penalty may be imposed in certain cases provided that the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law describes as statutory aggravating circumstance.

In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.

Such a circumstance is defined as a

statutory aggravated circumstance under the law of this state.

Members of the jury, you have found this defendant guilty of the offense of murder, and you may recommend one of two sentences as punishment, if you believe beyond a reasonable doubt that the offense was committed under the aggravated circumstance or circumstances as contended by the State. If you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravated circumstances beyond a reasonable doubt," and you must set forth in writing the aggravated circumstances which you find to exist.

If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you would return a verdict as follows:

"We recommend life." The effect of this sentence would be that the Court would sentence this accused to life imprisonment.

Now, members of the jury, you should consider all evidence submitted in both phases of the trial of this case in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case.

Members of the jury, even if you find beyond a reasonable doubt that the State has proved the existence of aggravating circumstances in this case, which would justify the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized, under these circumstances, to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion, and you may provide for a life sentence for this accused for any reason that is satisfactory to you, or without any reason, if you care to do so.

The law vests the exclusive right with the jury to either make or withhold a

recommendation for the death sentence.

Of course, if the State has failed to prove beyond a reasonable doubt that the offense was committed under the aggravated circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding the death penalty cannot be imposed. In that event, your verdict would be, "We recommend life," the effect of which would be that the Court would sentence this defendant to life in prison.

The law requires that the Presiding Judge give to the jury certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will give you this written charge.

Now, Ladies and Gentlemen, in the event that you recommend the death penalty in this case, you must write out the recommendation of your findings as to any statutory aggravated circumstances in the form which I have given

to you in these instructions.

Your verdict must be unanimous; that is, agreed to by all 12 of your members. It must be in writing, dated, and signed by your foreman.

You may retired to consider your verdict.

The alternates will kindly stand aside.

(Whereupon the jury retired to the jury room, at 4:20 p.m.)

THE COURT: Any exceptions?

MS. WALL: I have none, Your Honor.

MR. COKER: Your Honor, at this time, Your Honor, however, I would specifically reserve any objections.

THE COURT: I see. All right. Any exceptions are, of course, reserved.

Do you want to look at that?

MR. COKER: Okay.

(At 5:44 p.m. the following transpired.)

THE COURT: Now, for the record, it being about 5:45 p.m., I have this question. "May you advise us the soonest a person can be released if given a life sentence?" I propose to answer that as follows: "I am not permitted to answer this question. Signed."

IN THE SUPREME COURT OF GEORGIA

DONALD WAYNE THOMAS, Appellant	)	
against	)	No. 36046
STATE OF GEORGIA, Appellee	)	

APPELLANT'S MOTION FOR FULL BRIEFING AND FOR ORAL ARGUMENT ON REMAND TO THIS COURT

Appellant, Donald Wayne Thomas, by his undersigned counsel, respectfully moves this Court for full briefing and for oral argument of the issues raised by the vacation of his sentence of death ordered by the Supreme Court of the United States and the remand of his case "for further consideration in light of Godfrey v. Georgia, 446 U.S. _____, 100 S.Ct. 1759, 64 L.Ed.2d 398, (1980)."

Prior Proceedings

Appellant was convicted of the murder of Dewey Baugus on October 24, 1979, and was sentenced to death. The trial jury found one aggravating circumstance, that the murder had been "outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Ga. Code Ann. §27-2534.1(b)(7).

This Court affirmed appellant's conviction and sentence in Thomas v. State, _____ Ga. _____, 266 S.E.2d 499 (1980). No motion for rehearing was filed.

In his petition for certiorari, the appellant presented three issues: whether he was denied due process by the trial court's failure to conduct a hearing to determine his mental competency prior to trial, whether the absence of a limiting construction of the aggravating circumstance in Ga. Code Ann. §27-2534.1(b)(7) violated petitioner's rights under the Eighth and Fourteenth Amendments, and whether petitioner was denied his Sixth and Fourteenth Amendment rights as construed in Witherspoon v. Illinois, 391 U.S. 510 (1968), in the jury selection process.

On November 17, 1980, the Supreme Court entered the following order:

> The motions of petitioners for leave to proceed in forma pauperis and the petitions for writs of certiorari are granted. The judgments are vacated and the cases remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. _____ (1980). Chief Justice Burger, Justice Blackmun, Justice Powell and Justice Rehnquist dissent.

49 U.S.L.W. at 3371.[1/]

Issues Presented on Remand

This case presents important constitutional issues left unresolved by the Supreme Court's decision in Godfrey

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1/ The same order was issued in the cases of Patrick v. Georgia, and Hardy v. Georgia, 49 U.S.L.W. 3371.

v. Georgia, supra, which should be addressed by this Court only after full briefing and argument. In addition, if provided the opportunity to brief and argue this case, appellant would bring to the attention of this Court further authority on the question of whether trial of this case without a mental competency hearing violated his right to due process of law. A full hearing of these issues would be consistent with the statutory[2/] and constitutional[3/] rights of appellant and be in the interest of justice in this case.

The issues which appellant seeks to address in a brief to this Court are as follows:

1. Whether appellant is entitled to a new sentencing hearing because the trial court did not define for the jury the terms of the aggravating circumstance set out in Ga. Code Ann. §27-2534.1(b)(7).

2/ Ga. Code Ann. §27-2537(d) provides that where this Court reviews a sentence of death "[b]oth the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court."

3/ The Sixth and Fourteenth Amendments guarantee appellant the right to counsel not only at sentencing proceedings, Mempha v. Rhay, 389 U.S. 128 (1967); Townsend v. Burke, 334 U.S. 736 (1948), but also on appeal. Douglas v. California, 372 U.S. 353 (1963). If this right is to be meaningful, appellant should be provided the opportunity to present his views through counsel before a decision by this Court. Moreover, because of the "qualitative difference" between death and any other penalty, there is a corresponding difference under the Eighth Amendment "in the need for reliability in the determination that death is the appropriate punishment . . . ." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Undoubtedly, Georgia law provides for briefs and mandatory oral argument in cases involving the death sentence in recognition that such participation by the parties will assist the Court in making a sound and reliable decision.

In Godfrey v. Georgia, supra, the Supreme Court reversed a death sentence based upon §(b)(7) where the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms." Godfrey v. Georgia, supra, 100 S.Ct. at 1765 (Plurality opinion). The Court pointed out that "the jury's interpretation of §(b)(7) can only be the subject of sheer speculation." Id.

The same is true in appellant's case. The trial court provided the jury with nothing more than the bare words of §(b)(7) in both its oral and written instructions. Tr. at 565-566, 597.4/

Thus, this Court must decide whether appellant is entitled to a new sentencing hearing at which the sentencer's discretion will be channeled by "clear and objective standards" that provide "specific and detailed guidance" which make "rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, supra, 100 S.Ct. at 1764-65; Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffit v. Florida, 428 U.S. 242, 253 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Mr. Justice Marshall's concurring opinion in Godfrey expresses the view that only a properly instructed jury may impose the sentence of death:

4/ The trial court instructed the jury:

> In this case the State contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this State.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

100 S.Ct. at 1769 (Marshall, J., concurring).

Without dealing further with this issue at this time, appellant respectfully submits that this question is an important and complex one and that the parties could assist this Court in resolving it by providing briefs and arguments prior to any decision.[5/]

2. Whether Ga. Code Ann. §27-2534.1(b)(7) was applied in an unconstitutionally vague or overbroad fashion in this case.

Assuming arguendo that appellant is not entitled to a new sentencing hearing, there remains the question whether, in light of the Supreme Court's decision in Godfrey, the aggravating circumstance set out in §(b)(7) was properly applied to the facts of this case.

5/ It is of course clear that appellant cannot be resentenced by this Court. Ga. Code Ann. §§27-2503(b), 26-3102 provide that the jury is the sentencing authority, and this Court is charged under Ga. Code Ann. §27-2537 with appellate review of sentences imposed by the trial court. No statutory provision gives this Court power to act as a sentencing authority de novo in a capital case.

The Supreme Court in Godfrey, supra, and this Court in Hance v. State, _____ Ga. _____, 268 S.E.2d 339 (1980), defined some of the boundaries of the application of §(b)(7). Moreover, this Court has made clear its intention to limit the application of §(b)(7) to cases that lie "at the core and not the periphery" of the conduct covered by that aggravating circumstance. Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976).

This case was originally briefed, argued and decided prior to the holdings in Godfrey and Hance. Appellant respectfully urges this Court to permit him to put forward in a brief and an argument his position as to the applicability of those decisions to this case.

3. Whether the failure of the trial court to conduct an evidentiary hearing and make findings on the issue of appellant's mental competency deprived him of due process of law.

Although the issue of appellant's competency was raised in the brief filed in his original appearance before this Court, the Court was not directed to several cases decided by the United States Supreme Court on this issue. Since this case is now before this Court for further review, it would be in the interest of justice and judicial economy for this Court to consider additional arguments on this issue.

Appellant was examined by three psychiatrists prior to trial and diagnosed as schizophrenic. The three were evenly divided in their opinions as to his competency. Dr. Lloyd T. Baccus, M.D., found appellant incompetent, Dr. Sheldon B. Cohen could not state an opinion, and a letter signed by Dr. Jose M. Delatorre, the medical director of the forensic services divison at Central State Hospital, expressed the view that appellant was competent.[6/]

All of this psychiatric opinion was received in letters to the Court. Much of the information contained in the letters was conclusory in nature. No testimony was taken on the question of competency and there were no judicial findings as to appellant's competency to stand trial.

In its intial review of appellant's conviction, this Court rejected appellant's assertion that he should not have been tried until resolution of the competency issue, basing its decision on the fact that Central State Hospital "certified" his competency to the trial court and, apparently, its view that appellant may have waived the issue by proceeding to trial "without objection." Thomas v. State, supra, 266 S.E.2d at 502-03.

However, the briefs submitted to this Court during the course of that appeal failed to direct the attention of this Court to Supreme Court cases indicating that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial."

6/ It is not apparent from the letter whether appellant was examined by Dr. Delatorre or other members of the hospital staff. The letters appear in the record on appeal at 6-7 and 14-17 and are appended to the Report of the Trial Judge to this Court.

Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956), reversing 96 U.S. App. D.C. 117, 223 F.2d 582 (1955). It appears that where there is conflicting documentary evidence on the question of competency, as was the case here, an evidentiary hearing is required. In Bishop v. United States, supra, the Supreme Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of competency without a hearing on the information before the trial court, which included a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curium decision, the Supreme Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961.7/

Moreover, appellant would respectfully point out that the right to not be tried while incompetent is not a right which can be waived. As Mr. Justice Harlan observed in Pate v. Robinson, supra, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity

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7/ In accordance with the Supreme Court cases, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise a doubt as to the defendant's competency. See, e.g., Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, _____ U.S. _____, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill, 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen, 278 Minn. 212, 153 N.W.2d 339 (1967).

to stand trial." Id. at 384 In his dissenting opinion in that case, Mr. Justice Harlan pointed out that if there were error on the question of competence "such an error is not 'waived' by failure to raise it . . . . Waiver is not an apposite concept where we premise a defendant so deranged that he cannot oversee his lawyers." Id. at 388. (Harlan, J., dissenting). Thus, state and federal courts have squarely held that the issue of incompetency was not waived by failure to assert it prior to trial where evidence raising a question as to competency was before the trial court. See, e.g., Taylor v. United States, 282 F.2d 16, 23 (8th Cir. 1960), where, in a case decided before Pate v. Robinson, the Court of Appeals held that "if one is mentally incompetent, then, by definition, he cannot be expected to raise that contention before the trial court and thus cannot be prejudiced by his failure to do so . . . ."; Commonwealth v. Hill, supra, 375 N.E.2d at 1170, where the Court citing Robinson, reversed a conviction even though the defendant, unlike appellant, did not assert at any time prior to trial that he was incompetent; Fitch v. Estelle, supra at 776-777; Rhay v. White, supra at 886; State v. Jensen, supra, 278 Minn. at 216-17, 153 N.W.2d at 342; People v. Livingston, 57 Mich. App. 726, 226 N.W.2d 704, 709-10 (1975).

Because there is a substantial question of constitutional significance as to whether the trial court's treatment of the competency question comported with due process, full briefing and argument before this Court on the issue would be appropriate.

Conclusion

For the reasons stated herein, appellant respectfully urges this Court to permit him to brief and argue orally these issues on remand on a schedule to be established by this Court, in order to assist the Court in resolution of these complex and important issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on Assistant District Attorney Carole Wall, Third Floor, Fulton County Courthouse, Atlanta, Georgia, 30303, and upon Attorney General Arthur Bolton, Judicial Building, Atlanta, Georgia 30334, by mailing a copy of the same to each of them this 18th day of December, 1980.

Stephen B. Bright

[Death-qualifying voir dire of Ms. Frances Ogletree:]

[THE COURT:] Give your name, please, ma'am.

THE JUROR: Frances Ogletree.

THE COURT: Mrs. Ogletree, the Court inquires, are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might develop in the trial of this case if you were selected as a juror?

THE JUROR: I believe I would go on the evidence.

THE COURT: Well, the question is, would you automatically vote against capital punishment without regard to any evidence that might be developed at the trial of the case?

THE JUROR: No. No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the defendant's guilt, again assuming that you are selected as a juror?

THE JUROR: I don't quite understand that, Judge Weltner.

THE COURT: Well, you said that you were opposed to capital punishment.

THE JUROR: Right.

THE COURT: I am asking you whether that feeling on your part would prevent you from making an impartial decision as to the question

of guilt or innocence?

THE JUROR: I'm afraid it would.

THE COURT: All right.

MS. WALL: Your Honor, I move that she be excused for cause.

THE COURT: Mr. Coker?

MR. COKER: I object, on the grounds previously stated.

THE COURT: All right, ma'am, you may be excused. Please check back on the fourth floor and see if they need you any more.

[Death-qualifying voir dire of Joyce Beachum:]

THE CLERK: Mrs. Joyce Beachum.

THE COURT: Mrs.Beachum, the Court inquires of you as follows. Are you conscientiously

opposed to capital punishment?

THE JUROR: Opposed? I don't know.

THE COURT: Ma'am --

THE JUROR: I never thought about it.

THE COURT: Let me ask you this question. Would you automatically vote against the imposition of a death sentence without regard to any evidence that might be developed in the trial of the case, if you were a juror in a case?

THE JUROR: No.

THE COURT: Would your attitude toward the death penalty prevent you from making any impartial decision as to the question of guilt or innocence?

THE JUROR: No.

BY MS. WALL:

Q Mrs. Beachum, you say you have never considered capital punishment?

A No. You read about it, you think about it, but unless it affects you, you know, you never just really, you know, think about it real deep.

Q All right, ma'am. Could you consider a case so horrible that you would write out a death sentence on a person, if you were the foreman of a jury?

A Could I do what now?

Q Could you consider the circumstances, the circumstances of the murder were such, that if you were foreman of the jury you could write out, we the jury sentence the defendant to death?

A No.

Q You could not write out the death sentence?

A I don't think so.

Q Ma'am, are there any circumstances so horrible that you could consider the death sentence?

THE COURT: Excuse me, consider writing it out.

BY MS. WALL:

Q Consider imposing it?

A Imposing it. Well, I guess I could consider imposing it. You mean, help carrying it out, right?

Q No. I mean, can you vote for the death sentence? Could you go in that jury room and vote for the death sentence?

A Oh, no.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

THE COURT: You want to inquire further?

MR. COKER: Yes, Your Honor.

BY MR. COKER:

Q Mrs. Beachum, are you employed outside the

home?

A Yes.

Q In what capacity?

A I am a resident manager for Paradise Apartments.

Q And where is that located?

A Well, the base office is on 504 Fifth Street, but I work on Hollywood Road.

Q Now, are you conscientiously opposed to capital punishment?

A Opposed to it?

Q Right.

A Okay. You are saying am I against capital punishment?

Q Right.

A Yes, I am against it.

MR. COKER: Your Honor, I request the Court to reiterate the second and third qualifying questions on that, before making a ruling on whether she should be struck for cause.

THE COURT: Now, Madam Juror, listen very carefully to these questions here. If there is anything about the question you don't understand, you ask me. We have got all day to answer the questions, so don't get nervous or

feel like anybody is rushing you. What I have got to know under the law is this. Regardless of what the evidence might be in a case, is your feeling about capital punishment such that you would automatically vote against the death sentence, no matter what the evidence might be?

THE JUROR: Okay, I don't like the death sentence, and I just feel that there could be another way of doing things, so --

THE COURT: Now, answer my question. Notwithstanding that --

THE JUROR: All right.

THE COURT: -- and regardless of what the evidence in the case might be, is your view of the death penalty such that under no circumstances would you ever vote to impose the death penalty?

THE JUROR: No.

THE COURT: Are you telling me that you can conceive of situations wherein you would vote to impose the death penalty?

THE JUROR: Yes.

THE COURT: And we are talking about voting to send someone to the electric chair to be electrocuted.

THE JUROR: Mmh-hmm.

THE COURT: Now, ma'am, answer this question. Is your attitude toward the death penalty as you have expressed it today, is that such as would prevent you from making an impartial decision as to the question of whether or not the defendant is guilty or innocent, independent of punishment?

THE JUROR: I think I could make a fair judgment.

THE COURT: About guilt or innocence?

THE JUROR: About guilt or innocence.

THE COURT: All right, Ms. Wall.

MS. WALL: Your Honor, I'd ask that she be excused for cause.

MR. COKER: I object to that, Your Honor.

MS. WALL: She has stated, based upon my question, that she could not go in there and vote for the death penalty. That is what she told me in her answer.

THE COURT: Well, let me inquire further. Now, you recall the question Ms. Wall is talking about. Do you want to comment on that? Either your mind is such that there are cases where you could vote for the death penalty, or

there is no possible case where you could vote for the death penalty, and the Court has got to know which one of those is yours.

THE JUROR: Okay. Now, if we find the person -- if all evidence show that he was guilty, then I could render a judgment on that.

THE COURT: On whether the defendant is guilty?

THE JUROR: Yes.

THE COURT: Now, assume that you find the defendant guilty, would you be able, in any case, to vote for the imposition of a penalty of execution; that is, to impose the death penalty?

THE JUROR: Well, I guess if that's the alternative, yeah, if that's the last thing that's left.

THE COURT: You would be able to vote for a death penalty?

THE JUROR: If that's the only thing, if this is what you are asking.

THE COURT: I am asking you, ma'am, whether or not --

THE JUROR: Yes.

THE COURT: Whether or not there is any case, notwithstanding the fact that you don't like the death penalty, you think there is other means, is there any case that you can conceive that you would vote to send somebody to the electric chair to be executed?

THE JUROR: No.

THE COURT: All right, what do you say?

MS. WALL: I ask that she be excused for cause.

THE COURT: What do you say, Mr. Coker?

MR. COKER: I object to any excuse for cause.

THE COURT: Would you be good enough to wait in there just a minute, please.

(Whereupon the juror left the courtroom.)

THE COURT: Do you want to argue that, or just note your objection?

MR. COKER: Your Honor, she has --

THE COURT: I know what she has done. She has said three or four different things, but the last time she said she could not.

MR. COKER: Judge, in view of her other ambivalent answers, and the fact that it has taken a great deal of the Court's time to ask these questions, I would object to any excuse

for cause with this prospective juror. She has not categorically said that she will not impose the death penalty.

THE COURT: That is what she just said, Mr. Coker. That is as categoric as you can get. That is not what she said before, I agree.

MS. WALL: I ask to strike her for cause.

THE COURT: Well, I think, as a matter of fact I will strike her for cause, and I will have to do that as I understand the law. I agree with you that she is quite ambiguous about it, but when it comes down to talking about sending somebody to the electric chair to be executed her ambiguity seems to fade away. I will have to grant the motion of the State.

All right, ask the lady to come in here, please, sir.

(Whereupon the juror returned to the stand.)

THE COURT: Okay, Mrs. Beachum, the Court is going to excuse you. Thank you very much. Please check back on the fourth floor, see if they need you.

All right, Mr. Sheriff.

[Death-qualifying voir dire of Eddie Watkins:]

THE CLERK: Eddie M. Watkins.

THE COURT: Mr. Watkins, the Court asks you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Yes.

THE COURT: Would you automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of this case, if you were selected as a juror?

THE JUROR: No, I wouldn't automatically vote against it, no.

THE COURT: The Court inquires as follows. Can youconceive of a case wherein you would vote to impose capital punishment; that is, to vote to have a defendant convicted of murder, sent to the electric chair for electrocution?

THE JUROR: If the Court, you know -- no, I couldn't. No, I wouldn't do that. No, I would not.

THE COURT: All right. Would your attitude toward the death penalty prevent you from making an impartial decision as to the defendant's guilt; that is, on the question of guilt or innocence. Again, if you were selected to serve in this case.

THE JUROR: No, it would not.

THE COURT: You want to inquire?

MR. COKER: Your Honor, I'd like a clarification of your next to last question. The answer thereto.

THE COURT: I believe he said no, he could not do that. I interpret that to mean there is no case wherein he could conceive he would willingly vote to impose the death sentence. Now, if I'm incorrect --

THE JUROR: I thought you said capital punishment.

THE COURT: That is sending somebody to Reidsville to the electric chair to be executed.

THE JUROR: No, I wouldn't vote that way.

MS. WALL: Your Honor, I move he be excused for cause.

MR. COKER: Your Honor, I object for the same reason.

THE COURT: All right, you may be excused.

I think we had better explain to this jury the question that I am going to ask each of them, so that they can be thinking about that, and don't get hit, maybe, cold.

All right, we will take the next 12 and

do whatever general voir dire either of you wish to do, after putting them in the box.

[Death-qualifying voir dire of Ms. Christine Reese:]

THE CLERK: Ms. Christine Reese.

THE COURT: All right, let me ask you, ma'am, are you conscientiously opposed to capital punishment?

THE JUROR: Yes, I am.

THE COURT: Does that mean that under no circumstances would you consider voting for a death penalty?

THE JUROR: Well, I would have to hear the facts.

THE COURT: What I am asking you is this. Is your opposition to capital punishment such that there would be no case in which you would vote for capital punishment?

THE JUROR: No.

THE COURT: You want to inquire further?

MR. COKER: Judge, I'm not sure I understood her answer.

THE COURT: I think it was, no, there is not. Is that your last answer, ma'am?

THE JUROR: If I understood you to say

are there any circumstances, I would just say no to it.

THE COURT: All right. I want to ask you this. I want to ask you, if your view on capital punishment is so strong that under no circumstances, that you could conceive, would you ever consider voting for the death penalty if you were a juror? That is the question.

THE JUROR: No, my views are not that strong.

THE COURT: Well, is it such that, such that you might, under some evidence in the case, vote for the death penalty?

THE JUROR: Under extreme cases, extreme, but I don't believe in corporal punishment.

THE COURT: Well, in an extreme case, as you might view that word, would you be willing to consider voting for the death penalty, in an extreme case?

THE JUROR: I don't think I could. I don't think I could.

THE COURT: Would your view on capital punishment prevent you from making an impartial verdict on the question of whether or not the

defendant is guilty or innocent?

THE JUROR: No.

THE COURT: It would not?

THE JUROR: No, sir.

BY MS. WALL:

Q Mrs. Reese, is there any case where you yourself could go into a jury room and vote to sentence someone to the electric chair at Reidsville.

A No, ma'am.

MS. WALL: Your Honor, I ask that she be excused for cause.

THE COURT: You want to inquire further, Mr. Coker?

MR. COKER: Your Honor, at this time I would just object.

THE COURT: Okay. Mrs. Reese, now, you can be excused. Please go back down to the fourth floor and tell them you are available for further service.

THE JUROR: All right.

THE COURT: Thank you, ma'am.

[Death-qualifying voir dire of Evelyn Thompson:]

THE CLERK: Mrs. Evelyn Thompson.

THE COURT: Mrs. Thompson, I inquire of you as follows. Are you conscientiously opposed to capital punishment?

THE JUROR: Well, I don't really know that much about it. I mean -- you mean -- explain that one more time, about capital punishment, please, sir.

THE COURT: Capital punishment means electrocution in the electric chair, imposition of the death sentence. Are you conscientiously opposed?

THE JUROR: Yes, I am.

THE COURT: Now, let me ask you this.

Would you automatically vote against the imposition of the death sentence without regard to any evidence that might be developed on the trial of the case?

THE JUROR: No.

THE COURT: Now, would your attitude toward the death penalty prevent you from making an impartial decision as to the question of guilt or innocence?

THE JUROR: I really don't know, at this point.

THE COURT: Well, let me explain to you that under the procedure of the State, in a case where the death penalty is sought, the jury first determines whether or not a defendant is guilty or innocent without considering the question of punishment. Only, of course, if the defendant is found guilty would the question of punishment be considered. Now, I am asking you, would your attitude on capital punishment render you unable to make an impartial decision as to the question of guilt or innocence?

THE JUROR: I'm afraid it would.

MS. WALL: Your Honor, I'd ask that she

be excused for cause.

MR. COKER: I object on the grounds previously stated in Court.

THE COURT: All right, Mrs. Thompson, we will excuse you. You need to be back at 9:20 with the other jurors. You will not have any further responsibility in this case.

THE JUROR: Okay, thank you.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Office-Supreme Court, U.S.
FILED
JUN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-6604

ORIGINAL COPY

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The State of Georgia, by and through the Attorney General for the State of Georgia, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of decisions by the Supreme Court of Georgia in this case. These decisions are recorded as Thomas v. State, 245 Ga. 688 (1980) decided April 23, 1980 and the addendum thereto 247 Ga. 233 (1981) decided March 3, 1981. These decisions are contained in the appendix to the petition.

QUESTIONS PRESENTED

1. Did the Supreme Court of Georgia in affirming the imposition of the death penalty in the instant case apply Ga. Code Ann. §27-2534.1(b)(7) in a constitutional manner?

2. Did the Supreme Court of Georgia employ the proper procedure on remand from this Court and properly reaffirm Petitioner's death sentence in light of Godfrey v. Georgia, 446 U.S. 100 S.Ct. 1759 (1980)?

3. Was the trial court constitutionally required to provide the Petitioner with an evidentiary hearing on the issue of capacity to stand trial under the circumstances of the instant case?

4. Was the jury selected under the principles contained in Witherspoon v. Illinois, 391 U.S. 511 (1968)?

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PART ONE

STATEMENT OF THE CASE

Donald Wayne Thomas, Petitioner, was indicted in Fulton County in May, 1979, for the murder of Dewey Baugus. (R. 1-2).[1] Following the first psychiatric examination, Petitioner was found on June 1, 1979 not competent to stand trial. (R. 8-11). However, after a later examination, Dr. Jose M. Delatorre of Central State Hospital informed the Court on September 24, 1979, that Petitioner was able to distinguish right from wrong, and had not been acting under the influence of a compulsive delusion and was competent to stand trial. (R. 16-17). Following a jury trial, Petitioner was found guilty and was sentenced to the death penalty. (R. 119-120).

On April 19, 1979, the partially decomposed body of nine-year-old Dewey Baugus was found in the bushes near some railroad tracks in Atlanta. (T. 345-346, 411-417). Young Baugus had last been seen alive several days earlier by a playmate when they went to a ball field together. (T. 460-461).

An autopsy performed by Dr. Saleh Zaki showed that the victim had sustained abrasions and bruises on the neck extending to the larynx and upper chest, and a hemorrhage in the left eye. (T. 433-434). Bruises were also discovered on the head and there were fine hemorrhages in the coverings of the lung and heart. (T. 434-435). Due to the body's advanced stage of decomposition, Dr. Zaki could not determine the time of death, but did state the victim had been dead at least three days. (T. 443). The cause of death was asphyxiation due to neck trauma, probably strangulation, according to Dr. Zaki. (T. 435).

The State's main witness and Petitioner's girlfriend, Linda Cook, testified that she had known both Petitioner and

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1/ "R" indicates record in trial court. "T" indicates trial transcript.

the victim. (T. 349-350). Ms. Cook stated that on April 13, 1979, Petitioner led her to the railroad tracks where she saw the body of Dewey Baugus lying on his stomach. (T. 351-352). Ms. Cook noticed that Petitioner had blood on his pants. (T. 350). Petitioner told her that he had killed Baugus. (T. 352). Petitioner then turned the boy's body over and proceeded to jump on the victim's neck. (T. 352). He told Ms. Cook that he had to make sure that Baugus was dead. (T. 352). He then threw the body into some bushes. (T. 352). Ms. Cook further testified that Petitioner said he had choked and beaten the victim with a stick. (T. 380).

Petitioner's stepfather, Enzor Lowe, testified that both Ms. Cook and Petitioner told him that Petitioner had killed a boy. (T. 387, 390). Lowe further stated that Petitioner had been grinning when he admitted the killing and that he (Lowe) did not believe Petitioner. (T. 390).

Glenda Wilborn, the victim's mother, stated that she had last seen her son the evening of April 11th when he left home with a playmate. (T. 469). On April 12th, Linda Cook came to stay with Ms. Wilborn, but the Petitioner came by later that day to get Ms. Cook. (T. 471-472).

After police was informed by Ms. Cook that Petitioner had thrown his bloodied pants behind his Primrose Circle apartment, Detective Guy Lloyd found a pair of stained pants in the area described by Ms. Cook. (T. 355, 401-402, 403).

An examination of the pants by a forensic serologist revealed that the stain was blood of human origin. (T. 464-465).

Following the State's evidence, the defense rested its case without presenting any witnesses or evidence. (T. 496).

In the sentencing phase, the State introduced copies of an indictment plea and sentence of the Petitioner to child molestation. (R. 557, 588, 589, 590) and introduced copies of an accusation plea and sentence of the Petitioner to the charge of aggravated assault with intent to rape. (T. 558, 591, 592, 593, 594).

The Supreme Court of Georgia affirmed the Petitioner's conviction and sentence on April 23, 1980. Thereafter, the Petitioner filed an Application for Writ of Certiorari. This Court remanded the case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Thereafter the Supreme Court of Georgia issued an addendum to its decision which is reported as Thomas v. State, 247 Ga. 233 (1981) decided March 3, 1981.

Thereafter the Petitioner filed the instant petition for writ of certiorari.

PART III

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. §27-2534.1(b)(7), IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 420, 100 S.Ct. 1759 (1980).

The Petitioner asserts that this Court should grant certiorari to consider whether the Georgia Supreme Court construed or applied Ga. Code Ann. §27-2534.1(b)(7) in an unconstitutional manner. The Petitioner alleges that the Georgia Supreme Court employed such a broad and vague construction of the words "torture" and "depravity of mind" in upholding the Petitioner's death sentence as to violate the Eighth and Fourteenth Amendments to the Constitution.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. §27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been outrageously or wantonly vile, horrible and inhuman. This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey, id., at page 1765. In the instant case, however, relating to the (b)(7) aggravating circumstance, the jury found the following aggravating circumstance, ". . . that choking and strangling of a 9 year child causing axphyxiation by the defendant was outrageously + wantonly vile, horrible and inhuman in that it involved torture and depravity of mind, . . .". (R. 118, 119). As opposed to Godfrey, the wording of the jury's

finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, revealed sufficient evidence to support the jury's finding that the victim suffered from torture, and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

The Petitioner admitted to the State's witness Ms. Cook that the Petitioner told her that he had choked and beaten the victim with a stick. (T. 380). The medical evidence showed the cause of death as asphyxiation due to neck trauma, probably strangulation, of a nine year old child who weighed less than sixty pounds. (T. 432). Such evidence would clearly support a finding by a rational trier of fact of serious physical abuse prior to death. Along with this was evidence which would authorize a finding of serious sexual abuse to the victim which would also constitute serious physical abuse. It is also apparent that a defendant who tortures the victim or subjects the victim to an aggravated battery before the killing can be found by a rational trier of fact to have a depraved mind. See Hance v. State, 245 Ga. 856 (268 S.E.2d 339) (1980).

In Gregg v. Georgia, 428 U.S. 153, 201 (1976) the plurality opinion addressed the issue of whether Ga. Code Ann. §27-2534.1 (b)(7) was overly broad and vague. This Court acknowledges that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that code section was upheld. Here, the Georgia Supreme Court engaged in a detailed examination of the facts in this case as applied to the (b)(7) aggravating circumstance found by the jury. In reality, since this Court's

decision in Godfrey, the Supreme Court of Georgia has taken even greater pains to make its appellate review an elaborate and detailed process to insure against the imposition of a disproportionate or arbitrary death penalty. See, e.g. Hance v. State, supra; Cape v. State, 246 Ga. 520 ___ S.E.2d ____ (1980); Green v. State, 246 Ga. 598 ___ S.E.2d ___ (1980). Thus, the Georgia Supreme Court has met the mandates as set out by this Court in Gregg, supra, and Godfrey, supra.

Therefore, the Petitioner's allegations in this regard are without merit.

B. THE SUPREME COURT OF GEORGIA EMPLOYED THE PROPER PROCEDURE ON REMAND FROM THIS COURT AND PROPERLY REAFFIRMED THE PETITIONER'S DEATH SENTENCE IN LIGHT OF GODFREY v. GEORGIA, 446 U.S. 420, 100 S.CT. 1759 (1980).

The Petitioner in substance complains that the decision of the Georgia Supreme Court on remand was improper because the jury did not have the benefit of the decision by this Court in Godfrey v. Georgia, supra, and limiting instructions thereunder.

In the main, a key distinction in the instant case and in the case of Godfrey is the actual aggravating circumstance found by the jury. In Godfrey, the jury found only that the offense of murder was outrageously or wantonly vile, horrible or inhuman. Godfrey, sppra , at 1764. In the instant case there was a specific finding by the jury that this killing involved torture and depravity of mind. (R. 118-119). This finding by the jury of torture and depravity of mind in a specific verdict shows restraint of the arbitrary and capracious infliction of the death penalty.

The Petitioner further asserts in substance that the decision by the Supreme Court of Georgia on remand amounts to speculation that the jury had a constitutional rather than an unconstitutional basis for its decision. However, it is apparent that the Supreme Court of Georgia on remand considered the Petitioner's case as it was tried and as the issues were determined in the trial court. Cole v. Arkansas, 333 U.S. 196, 201 (1948). There was no speculation by the Georgia Supreme Court as to the basis of the jury's finding. The court performed its statutory duty and determined that the evidence supported the finding of the aggravating circumstance. The Respondent submits that the

Supreme Court of Georgia acted within its statutory authority and properly reaffirmed Petitioner's death sentence without ordering a new jury trial on sentencing.

The Petitioner further complains in substance that the Supreme Court of Georgia's failure to provide briefs or oral arguments upon remand from this Court allegedly violated the Petitioner's Sixth, Eighth and Fourteenth Amendments rights.

It is apparent however that the Petitioner's case was not remanded to the trial court, but to the Georgia Supreme Court. Clearly, the filing of additional briefs and having additional oral argument would be within the discretion of that court.

The review conducted by the Georgia Supreme Court was not a resentencing proceeding, but a more detailed review of the death penalty as imposed by the trial court. In essence the Georgia Supreme Court merely reconsidered its own judgment in light of the Godfrey decision by this Court. The Petitioner had the automatic review provided by the Georgia statute and had the opportunity to file briefs and have oral argument prior to any decision being made by the Georgia Supreme Court. There was no deprivation of a right to a hearing by the Georgia Supreme Court's consideration on remand, as the Petitioner had previously had a hearing before that court and had the opportunity to argue concerning the sentencing of the Petitioner. No new evidence existed on remand and no new laws has been enacted for the Court to consider. The Petitioner likens the actions of the Supreme Court of Georgia to those of a sentencing authority, but as pointed out by the Petitioner, the court has no authority to impose the death sentence. The Georgia Supreme Court merely reaffirmed the sentence previously imposed. Questions of briefs and arguments and when additional briefs may be filed are clearly within the province of the rules of the Supreme Court of Georgia and do not rise to the level of a constitutional question under the facts of this case.

Therefore, the Petitioner's complaints in this regard are without merit.

C. THE TRIAL COURT WAS NOT CONSTITUTIONALLY REQUIRED TO PROVIDE THE PETITIONER WITH AN EVIDENTIARY HEARING ON THE ISSUE OF COMPETENCY TO STAND TRIAL UNDER THE CIRCUMSTANCES OF THE INSTANT CASE.

In the instant case, three psychiatric evaluations of the Petitioner were performed by Order of the trial court. The first evaluation was reported to the trial court in the letter of Lloyd T. Baccus, M.D., dated June 4, 1979, which in substance indicated that the Petitioner was at that time, incompetent to stand trial. (See Appendix to Petition, pp. 9a, 10a). The second evaluation was done by Sheldon B. Cohen, M.D., and was reported to the trial court by letter on August 8, 1979. (See Appendix to Petition, pp. 11a, 12a). The report, in substance, could not reach a definitive diagnosis as to the Petitioner's competence to stand trial. Dr. Cohen's report noted there was a conflict between the information gathered in his observation of the Petitioner and the prior evaluation and speculated that this may have been caused by the effect of a prescribed tranquilizer, or " . . . that he may have simulated more in the previous interview than he did today." Dr. Cohen then recommended extended observation at Central State Hospital to clarify these factors.

The Petitioner had filed on June 25, 1980, a Special Plea of Incompetency to Stand Trial and a Motion for Transfer of Defendant to The Department of Human Resources. (R. 8). On August 10, 1979 the trial court issued an Order transferring the Petitioner to the Department of Human Resources. (R. 13).

On September 24, 1979, Jose M. Delatorre, M.D., reported to the trial court by letter in substance that based on the examination and evaluation conducted at Central State Hospital, that the Petitioner was competent to stand trial. (R. 16)

The Petitioner then went to trial on a general plea of not guilty on October 22, 1979. (T. 17).

It is apparent from the evidence before the trial court both prior and during the trial in the instant case that the quantum of evidence necessary to trigger a competency proceeding requiring an evidentiary hearing was not reached.

The general considerations in measuring this quantum of evidence necessary to trigger a competency procedure requiring an evidentiary hearing are (1) A history of irrational behavior; (2) the Defendant's demeanor at trial, (3) along with prior medical opinion. Chenault v. Stynchcombe, 546 F.2d 1191 (5th Cir. 1977), cert. denied 434 U.S. 878.

The resolution of this issue by necessity requires an individualized analysis. Jackson v. Caldwell, 461 F.2d 682 (5th Cir. 1972), cert. denied 409 U.S. 991 (1973). The Fifth Circuit Court of Appeals has noted in the case of Grissom v. Wainwright, 494 F.2d 30 (5th Cir. 1974) that extensive hearings and thorough psychiatric examinations are not vital prerequisites to the prosecution of every criminal case. Indeed, low intelligence or weird behavior cannot be equated with mental incompetency to stand trial. McCune v. Estelle, 434 F.2d 611 (5th Cir 1976).

Comparing the instant case with analgous proceedings under 18 U.S.C.A. 4244, it is clear that where a trial court had ordered a psychiatric evaluation and report, and that report indicated that the defendant was competent to stand trial, that no evidentiary hearing would be required. United States v. Greier, 521 F.2d 597 (5th Cir. 1975). As such, the trial court in the instant case took appropriate affirmative steps to examine the competency of the

Petitioner within the constitutional parameters as set out in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975). It can be seen from the report dated September 24, 1979 from Dr. Delatorre of Central State Hospital that there was insufficient evidence before the trial court to raise a bona fide and reasonable doubt as to the defendant's competency to be tried at the given point in time. (R. 16).

Therefore, the trial court was not required to hold an evidentiary hearing on the issue of the competency of the Petitioner to stand trial and as such, none of the Petitioner's constitutional rights have been violated in this regard.

D. THE JURY WAS PROPERLY SELECTED UNDER THE PRINCIPLES OF WITHERSPOON v. ILLINOIS.

The Petitioner has complained of alleged violations of the rule of this Court as determined in the case of Witherspoon v. Illinois, 391 U.S. 510 (1968). These complaints center around the striking for cause of the perspective jurors, Frances Ogletree, Joyce Beachum, Eddie Watkins, Christine Reese and Evelyn Thompson.

This Court has made it clear that a state may constitutionally exclude veniremen from a jury who make it unmistakably clear, (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, supra, page 522-523 n.21. This Court has further indicated in the case of Adams v. Texas, ___ U.S. ___ 100 S.Ct. 2 1 (1980) that a state is entitled under the Witherspoon rule to exclude jurors who are clearly not willing to consider all the penalties provided by law and would not be able to follow the instructions provided by the trial court.

It is therefore apparent from a review of the responses contained in the testimony of these prospective jurors that each was properly excused under the principles of Witherspoon v. Illinois.

Therefore, the Petitioner's allegations in this regard are without regard.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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NO. 80-6604

ORIGINAL COPY

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-6604

DONALD WAYNE THOMAS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT

The Respondent now submits to the Court this Supplemental Memorandum to bring to the attention of the Court the decision of the Georgia Supreme Court in the case of Blankenship v. State, ___ Ga. ___ No. 36970 decided May 6, 1981, and the addendum thereto. (See copy attached). In this case the Georgia Supreme Court indicated that it would now consider that in cases where the death penalty is imposed the improper exclusion of an otherwise qualified juror in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968) is harmful error regardless of whether the state utilized all of its peremptory strikes.

However, the Court should further note that it is the continuing position of the Respondent that no prospective jurors have been stricken in the instant case in violation of the Witherspoon rule.

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In the Supreme Court of Georgia

Decided: MAY 6 1981

36970. BLANKENSHIP v. THE STATE.

CLARKE, Justice.

The defendant was indicted for the offenses of aggravated sodomy, burglary, murder and rape. He was found guilty of burglary, murder and rape, and sentenced to death for murder and two 20-year sentences for burglary and rape to run consecutive to the death sentence, but concurrent to each other. The case is here on direct appeal and mandatory sentence review.

ENUMERATIONS OF ERROR

1. In his first four enumerations of error, the defendant contends that the evidence was insufficient to sustain the verdict and the sentence. From the evidence presented at trial, the jury was authorized to find the following factual situation: In the early morning hours of March 2, 1978, the defendant left a bar at which he had been drinking and began to walk home. As he walked past the victim's upstairs apartment, he decided that he wanted to break in. The victim was a seventy-eight year old female for whom defendant had done repair work. The defendant climbed up a railing to a porch of the victim's apartment where he kicked out the lower pane of a window. After waiting and watching briefly, defendant entered the apartment. The victim, who suffered from a respiratory illness, was sitting in a chair because she had trouble breathing when she slept. The defendant came up behind the victim and grabbed her by placing his hand over her mouth and nose to keep her from screaming. She struggled and fell from the chair; he fell on top of her. The victim became unconscious, and the defendant picked her up and took her back to

the bed. She was dressed in pajamas, and he pulled her pajama bottoms down and raped the victim. He then dressed and left the victim's apartment the same way that he entered it. Neighbors concerned about the victim due to her poor health eventually discovered her body. The victim had been severely beaten, scratched and bitten. She had been forceably raped, and a plastic bottle was found inserted in her vagina. She had suffered severe trauma to her oral cavity although forensic evidence could not establish oral sodomy.

Footprints left by an unusually patterned sole were found at the scene and led toward the defendant's house. The defendant's fingerprints were found at the scene, and shoes identical to the type which made the prints were recovered from the defendant's possession. The defendant made a confession; however, he denied that he beat the victim severely and at trial he recanted part of his confession and stated that he was unable to consummate the rape.

Forensic evidence established that the victim died from heart failure brought on by the trauma. Scrapings taken from the fingernails of the victim established that her attacker had international type "O" blood, the same type blood that the defendant possessed. However, scrapings taken from the left hand of the victim showed both international group "O" blood and an unexplained presence of a minute amount of "B" antigen which would have been presented in individuals of an international group "B" type blood.

A very small segment of Negroid hair was found from combings of the victim's pubic hair. However, the state introduced testimony that the black attendant at the autopsy had handled the body, and the jury was authorized to find that the small segment of Negroid hair had come from that source.

We have reviewed the record in this case and find the evidence supports the verdict of the jury beyond a reasonable

doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The defendant's fifth enumeration of error argues that the trial court erred in not instructing the jury that if defendant was found guilty of felony murder, he could not be convicted of the underlying felony.

In the present case the defendant was found guilty of felony murder and therefore the underlying felony is a lesser included offense. Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Atkins v. Hopper, 234 Ga. 330 (216 SE2d 89) (1975). While the court erred in failing to charge that defendant could not be convicted of felony murder and also the underlying felony, the remedy is not a new trial, but a reversal of the conviction of the underlying felony. Collier v. State, supra; Thomas v. State, 240 Ga. 393 (242 SE2d 1) (1977). To determine which felony formed the basis of the felony murder where more than one felony is charged in addition to the murder, one must look to the indictment, or if it is not specified as it is not in this case, then to the evidence. Collier v. State, supra. Following that rationale, in the instant case the evidence shows that the burglary was the initial felony which began the chain of circumstances which ultimately led to the death of the victim. Therefore, this offense merged with the felony murder conviction. The conviction for burglary alleged in Indictment No. 28455 is reversed, and the sentence as to that offense is vacated. Collier v. State, supra; Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980).

3. In enumeration of error six, defendant contends the trial court erred in charging on voluntary intoxication.

The trial court charged: "The fact that one accused of a crime was under the influence of alcohol or drugs at the time of the alleged crime may be shown as illustrative of his motive in the transaction but one voluntarily under the influence of alcohol

or drugs is presumed to intend the legitimate consequences of his act and the question is whether he intended to do the act or whether he intended the consequences of the act. If a person under the influence of alcohol or drugs is sufficiently intelligent to know or understand and intend to do a certain act and to understand that certain consequences are likely to result from it and does the act, he is criminally liable for the consequences of his act.

"However, if because of the influence of alcohol or drugs one's mind becomes so impaired as to render him incapable of forming an intent to do the act charged, or to understand that a certain consequence would likely result from it, he would not be criminally responsible for the act.

"Whether or not that is true is a question for you, the jury, to determine."

The defendant argues that the first sentence of the trial court's charge violates the rule of Sandstrom v. Montana, 442 U.S. 510 (99 SC 2450, 61 LE2d 39) (1979). Sandstrom held that the charge, "The law presumes that a person intends the ordinary consequences of his voluntary acts," was unconstitutional for two reasons: (1) the jury may have interpreted that presumption as conclusive; and (2) the jury may have interpreted that presumption as shifting the burden of persuasion to the defendant on the element of intent. The Supreme Court of the United States held that either interpretation would violate the Fourteenth Amendment requirement that the state prove every element of a crime beyond a reasonable doubt.

Pretermitting that the defendant was found guilty of felony murder, Bridges v. State, 246 Ga. 323 (271 SE2d 471) (1980), and that the charge was more favorable to the defendant than required, Code Ann. § 26-704; McLaughlin v. State, 236 Ga. 577 (224 SE2d 412) (1976), we find no Sandstrom violation in the first sentence of

the jury's instructions under attack. The trial judge charged the jury on the burden of proof, presumption of innocence, reasonable doubt, direct and circumstantial evidence, and that the burden is not upon the defendant to establish his innocence but that the burden is upon the state to prove his guilt. A jury instruction should not be considered in isolation, but the charge must be examined as a whole. Moses v. State, 245 Ga. 180 (263 SE2d 916) (1980), and cites. This charge is not similar to that charge considered in Sandstrom v. Montana, supra, but merely illustrates that the defendant has the burden, once criminal intent has been shown, of illustrating that his voluntary intoxication rose to a level required to negate intent. By its very terms, it is not a mandatory presumption and it is readily apparent that no reasonable jury would have viewed the instructions as mandatory or conclusive, nor would they have understood them as shifting the burden of persuasion to the accused as to a necessary element of the crime. See Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1980). Affirmative defenses such as this one are permissible. Patterson v. New York, 232 U.S. 197 (97 SC 2319, 53 LE2d 281) (1977); Moses v. State, supra (insanity); Franklin v. State, 245 Ga. 141 (263 SE2d 666) (1980) (accident); Hinkle v. Iowa, 290 NW2d 28 (1980) (voluntary intoxication). See also, Simmons v. State, 246 Ga. 390 (271 SE2d 468) (1980); Lackey v. State, 246 Ga. 331 (271 SE2d 478) (1980); Skrine v. State, 244 Ga. 520 (260 SE2d 900) (1979).

4. In enumerations of error 8 and 9, the defendant contends the trial court erred in excluding three jurors as being conscientiously opposed to capital punishment. All three were asked if their feelings towards capital punishment are such they would never vote to impose the death penalty, regardless of what the facts in the case might be. Two jurors were unequivocal in their negative answer and the trial court did not err in excusing them. The answers of the third juror demand closer scrutiny.

The colloquoy between the court and the juror was as follows:

"CLERK: Are any of you conscientiously opposed to capital punishment?

NOTE: (One juror raised his hand.)

THE COURT: All, you jurors have a seat. You remain standing there, please. What - - -

JUROR: Lamar Halstead. It might be listed as John Halstead.

THE COURT: You are conscientiously opposed to capital punishment?

MR. HALSTEAD: Not - - not opposed to capital punishment but - - but for myself, yes. I don't believe I could sentence someone to capital punishment.

THE COURT: Well, let me ask you this. Are your feelings towards the imposition of capital punishment such that you would never vote to impose the death penalty, regardless of what the facts in the case might be?

MR. HALSTEAD: Well, right now it is a personal thing to where I don't believe I could impose that.

THE COURT: All right. Step out.

MR. HALSTEAD: Thank you."

The question here is whether this juror should have been excused in light of the holding in Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). In Witherspoon, the United States Supreme Court said, "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." We must determine whether there is any ambiguity in the answers

given by Mr. Halstead. Among other things he said he was not opposed to capital punishment and followed this by saying he did not believe he could sentence someone to capital punishment himself. His last statement was, "Well, right now it is a personal thing to where I don't believe I could impose that." Each of these statements is fraught with ambiguity. In his initial comment, he expressed no opposition to capital punishment. This was followed by a qualification that he did not believe that he could personally impose it. The absence of disagreement with the principle of capital punishment coupled with a doubt of his own willingness to impose the penalty is an ambiguity. His final statement is also ambiguous in at least three respects. He uses the phrase "right now" which seems to be an equivocation as to the time at which he might be able to impose the penalty. At the time this answer was given he, of course, had not heard any of the evidence in the case. He said it was a personal thing and this statement leaves a doubt as to whether he might be able to overcome his personal feelings in order to comply with the mandates of the law. He did not say he could not impose capital punishment. He simply said he did not believe he could impose the penalty. This is equivocal to the point of being ambiguous. "The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out ...." Witherspoon, supra at 522, n.21.

We find that the court erred in excusing Mr. Halstead as a prospective juror. We therefore reverse the sentence of death

and remand the sentencing phase of the case for retrial.

5. In enumeration of error 10, the defendant contends the state cannot impose the death penalty in this case because, although the state had notified the defendant of its intention to seek the death penalty, the indictment did not allege the aggravating circumstances as defined in Code Ann. § 27-2534.1(b), which the state would rely on in seeking the death penalty.

The same issue was dealt with by this court in Bowden v. Zant, 244 Ga. 260 (260 SE2d 465) (1979), and found to be without merit.

6. In enumeration of error 11, the defendant contends the trial court erred in overruling his motion to appoint as an expert witness a certain psychiatrist who specialized in the type of behavior exhibited by the defendant. The trial court previously ordered that the defendant be examined by the Georgia Regional Hospital. The Forensic Service Program at the Regional Hospital, after consultation, found the defendant to be responsible for his actions at the time of the alleged offense and also found him competent to stand trial. It has been held that the trial court is under no constitutional or statutory duty to appoint a state paid psychiatrist to evaluate a defendant even though a special plea of insanity has been filed. There was therefore no abuse of discretion in denying defendant's motion for an additional psychiatrist here. Corn v. State, 240 Ga. 130(3) (240 SE2d 694) (1977); Leggett v. State, 244 Ga. 226(1) (259 SE2d 476) Dampier v. State, supra.

Note should be taken of the fact that defendant requested and was granted funds to hire a pathologist for independent examination of medical testimony, and that he was also granted funds to hire an independent investigator.

The denial of defendant's motion did not violate the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution nor the due process and equal protection clause of the Georgia Constitution.

7. In enumeration of error 12, the defendant contends the trial court erred in allowing Detective James to remain in the courtroom after the rule of sequestration had been invoked. Detective James was the chief investigating officer. At the conclusion of defendant's opening statement to the jury, the prosecutor asked that Detective James be allowed to remain in the courtroom although by the nature of his testimony, he would have to be used at different intervals throughout the trial in order to keep the continuity of the state's case. The prosecutor went on to say that they needed the detective two or three times during the trial. The court quered the prosecutor, "Do you need him?" The prosecutor replied, "We need him and request him." The defense counsel objected.

It is well established that a district attorney may have the chief prosecuting officer or investigating officer sit with him at the state's table to assist him during the trial. This is within the sound discretion of the trial court, even though the officer may testify after other witnesses have already testified. Jarrell v. State, 234 Ga. 410(6) (216 SE2d 258) (1975); Smith v. State, 245 Ga. 168(8) (263 SE2d 910) (1980). We find no merit in this enumeration of error.

8. In enumeration of error 13, the defendant contends the trial court erred in allowing photographs of the victim to be introduced in evidence.

"We have considered similar questions in a large number of cases and unless there are some very exceptional circumstances the photographs of the deceased are generally admissible to show the nature and extent of the wounds, the location of the body, the crime scene, the identity of the victim and other material issues. See Godfrey v. State, 243 Ga. 302, 304 (253 SE2d 710) (1979); Stevens v. State, 242 Ga. 34, 38 (247 SE2d 838) (1978), and Lamb v. State, 241 Ga. 10, 13 (243 SE2d 59) (1978). Doubtless,

photographs of the victim are prejudicial to the accused, but so is most of the state's pertinent testimony. The pictures may be gory, but murder is usually a gory undertaking. Moses v. State, 245 Ga. 180(6) (263 SE2d 916) (1980). We find no merit in this enumeration of error.

The convictions for murder and rape are, therefore, affirmed, and the conviction for burglary is reversed. The death penalty is reversed and remanded for retrial on the issue of sentencing.

Affirmed in part, reversed in part, and remanded. All the Justices concur, except Jordan, C.J., Undercofler and Marshall, J.J., dissent to Division 4 and reversal of the death penalty.

ADDENDUM

36970. BLANKENSHIP v. THE STATE

CLARKE, Justice.

On motion for reconsideration, the state urges that a Witherspoon error is harmless and not reversible when the state fails to exhaust its peremptory strikes as was the case here. We reject this argument and deny the motion for reconsideration. In so doing, we recognize that this court has previously indicated the establishment of a rule contrary to the one established here. See Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978) and Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979). However, we have reexamined Davis v. Georgia, 429 U.S. 122 (97 SC 399, 50 LE2d 339), in light of Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc Burns v. Estelle, 626 F.2d 396 (1980). Having done so, we now hold that in cases where the death penalty is imposed, the improper exclusion from the initial panel of an otherwise qualified juror in violation of Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968), is harmful error regardless of whether the state utilized all of its peremptory strikes.

~~ADDENDUM~~

36970. Blankenship v. The State

Gregory, Justice, concurring specially in Addendum.

I concur in the majority opinion on motion for reconsideration because I do not believe the mechanics of jury selection in death penalty cases will permit the harmless error rule announced in Alderman v. State, 241 Ga. 496 (246 SE2d 642) (1978).

The mechanics of the selection procedure require that 42 jurors be impaneled. Code Ann. §59-801. The defendant is allowed 20 peremptory challenges and the state 10. Code Ann. §59-805. Beginning with the first juror impaneled, each juror is put first upon the state for consideration as to use of a peremptory challenge, and then upon the defendant. Code Ann. §59-808. This process is most complex and a highly variable sequence of events may ensue. The use or non-use of a challenge by one party or the other sets up an entirely new group of possibilities with regard to the remaining jurors impaneled.

To illustrate, suppose the court permits a juror to be impaneled who, on voir dire, has given answers disqualifying him or her under Witherspoon. Assume that juror is number 36 and that another juror who is even more objectionable to the state is impaneled as number 39. Suppose as juror number 36 is placed upon the state in the selection process, a total of 10 jurors have been selected, and the state has 1 challenge remaining while the defendant has 4. What does the state do? If the state peremptorily challenges number 36 it will have no way to eliminate number 39. So, the state does not challenge number 36. Neither does the defendant. Then suppose neither party challenges juror number 37. The panel of 12 is complete. The state has remaining one unused challenge.

It just does not follow that it is harmless error to

wrongfully excuse a juror as being disqualified under Witherspoon simply because the state does not use all its peremptory challenges and therefore could have been expected to use a challenge to eliminate the juror even if impaneled. There are too many variables which may give rise to the non-use of a peremptory challenge.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA June 9, 1981

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of the said Court hereto affixed the day and year above written.

Hazel E. Thelford, Deputy Clerk